Applicant Details

First Name	**Iris**
Last Name	**Carbonel Estepan**
Citizenship Status	**U. S. Citizen**
Email Address	**ikc2108@columbia.edu**
Address	**Address** Street **150 Heard St., Apt. 625** City **Chelsea** State/Territory **Massachusetts** Zip **02150** Country **United States**
Contact Phone Number	**617-447-7297**

Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**June 30, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Race and Law**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Massachusetts, New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Genty, Philip
pgenty@law.columbia.edu
212-854-3250
Mukherjee, Elora
emukherjee@law.columbia.edu
212-854-6142
Spinak, Jane
spinak@law.columbia.edu
212-854-3857

References

1. Kevin Prussia (Kevin.Prussia@wilmerhale.com, 617-526-6243),
2. Kevin Jason (kjason@naacpldf.org, 212-965-2221), and
3. Jocelyn Keider (Jocelyn.Keider@wilmerhale.com, 617-526-6823).

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Iris Carbonel
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July 4, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals
Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am a graduate of Columbia Law School, and I write to apply for a clerkship in your chambers for the 2024-2025 term. I am a litigation associate at WilmerHale, and from July 2023 until July 2024, I will be clerking for Judge Denise Casper in the United States District Court for the District of Massachusetts. I would consider it a privilege to learn from you as one of your clerks.

Strong research and writing skills are strengths that I bring to this position. As a student in the Immigrants' Rights Clinic, I assisted a client in her application for asylum. In that role, I co-authored a brief and drafted witness affidavits in support of her application for asylum. As a New York Pro Bono Scholar at the Legal Defense Fund, I researched a range of legal issues in civil and criminal matters dealing with racial and economic justice and education. As a staff editor on the *Columbia Journal of Race and Law*, I provided substantive edits to pieces considered for publication, checked citations to ensure the source supported the proposition for which the author cited it, and ensured that sources were properly cited under the Bluebook. These experiences have taught me how to think about and discuss difficult legal issues, research efficiently, and be detail-oriented in my work.

In addition to these legal experiences, throughout my time in law school, I served in various leadership roles. The work I did outside of the classroom reflects the care with which I approach advocacy for my community, my ability to balance various competing responsibilities, and my work ethic. My experiences as a first-generation student and immigrant speak to my resilience and grit in the face of adversity. I am confident that I can contribute meaningfully to your chambers.

Enclosed, please find a resume, transcript, and writing samples. Also enclosed are letters of recommendation from Professor Philip Genty (212-854-3250, pgenty@law.columbia.edu), Professor Jane Spinak (212-854-3857, spinak@law.columbia.edu), and Professor Elora Mukherjee (emukherjee@law.columbia.edu). In addition, Kevin Prussia (Kevin.Prussia@wilmerhale.com, 617-526-6243), Partner at WilmerHale, and Kevin Jason (kjason@naacpldf.org, 212-965-2221), Assistant Counsel at the NAACP Legal Defense Fund, can serve as references for my legal work.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Iris Carbonel

Iris Carbonel

IRIS CARBONEL

150 Heard St., Apt. 625, Chelsea, MA 02150 • (617) 447-7297 • iris.carbonel@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. received June 2022
Honors: James Kent Scholar (2021-2022); Harlan Fiske Stone Scholar (2020-2021); Davis Polk Leadership Co-Fellow; Anti-Racism Grant Recipient; LaLSA Community Service Award
Activities: First Generation Professionals, President (2020-2021)
Columbia Journal of Race and Law, Staff Editor (2020-2021)
Teaching Assistant for Professor Elizabeth Emens (Contracts, Fall 2020)
Law School Pathways Program, Co-Founder
Black Law Students Association
Latinx Law Students Association

New York University, New York, NY
B.A. received May 2019
Major: Social Justice, Power Structures, and the Politics of Race
Honors: NYU President's Service Award; Malcolm X/ Martin Luther King Jr. Leadership Award

EXPERIENCE

The Hon. Denise J. Casper, U.S. District Court for the District of Massachusetts
Incoming Term Law Clerk July 2023- July 2024

WilmerHale, Boston, MA
Associate October 2022- Present
Drafted opening and reply briefs and assisted in preparing counsel for oral argument before the First Circuit to support client's claim for judicial review of denial of protection under the CAT; Drafted and filed a motion to enforce an injunction and a memorandum of law in support thereof based on district court's prior approval of a class settlement; Conducted various client and witness interviews, drafted letters of support, compiled evidentiary materials, and prepared petition in furtherance of our client's request for clemency to the North Carolina Juvenile Sentence Review Board; Prepared application for adjustment of status on behalf of Spanish speaking client.

NAACP Legal Defense Fund, New York, NY
New York Pro Bono Scholar March 2022- May 2022
Drafted deposition digests. Conducted a circuit survey of hair discrimination cases and tracked ongoing litigation. Summarized cases where the DC Circuit applied the forfeiture-of-self-defense-by-provocation standard. Researched whether appellate courts preserve facts on an appeal of summary judgment when the nonmovant failed to rebut evidence. Researched how appellate courts resolve the tension between the reasonable officer and the summary judgment standard. Evaluated whether a case of corporal punishment might succeed on appeal where there was no disciplinary purpose in the action taken.

Immigrants' Rights Clinic, New York, NY
Student Attorney September 2021- December 2021
Actively developed, researched, and proposed clinic team's strategy for a client's affirmative asylum case. Planned and facilitated weekly fact-gathering client meetings and interviews. Drafted client and witness affidavits. Procured and reviewed medical and psychological evaluations and expert testimony to support client's asylum application. Located and compiled evidentiary materials in support thereof. Drafted and revised brief in support of asylum. Served as student advocate for client during asylum interview. Assisted client with application for employment.

WilmerHale, Boston, MA
Summer Associate May 2021- July 2021
Researched and wrote memo regarding different valuation methods used in computing damages in a breach of fiduciary duty action post-closing. Researched the kinds of damages that flow from the denial of an opportunity. Reviewed and synthesized FOIA documents and filings to identify and understand relevant case law in Office of the Comptroller of the Currency adjudications. Researched examples of cross-border international cooperation efforts among governments in anti-corruption and other kinds of malfeasance investigations.

LANGUAGE SKILLS: Spanish (fluent), French (proficient)
BAR ADMISSIONS: New York (July 2022), Massachusetts (December 2022)

INTERESTS: Travel, Boston sports, Marvel movies, CrossFit

Columbia
Law School

Registration Services

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435 West 116th Street, Box A-25
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registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

06/15/2022 17:04:05

Program: Juris Doctor

Iris K Carbonel Estepan

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6795-1	Ex. Pro Bono Scholars	Spinak, Jane M.	4.0	A-
L6795-2	Ex. Pro Bono Scholars - Fieldwork	Spinak, Jane M.	8.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9258-1	Immigrants' Rights Clinic	Mukherjee, Elora; Wilson, Amelia	3.0	A+
L9258-2	Immigrants' Rights Clinic - Project Work	Mukherjee, Elora; Wilson, Amelia	4.0	A
L8293-1	S. Access to Justice: Current Issues and Challenges	Richter, Rosalyn Heather; Sells, Marcia	2.0	A-
L9274-1	S. Professional Responsibility: Becoming a Lawyer [Minor Writing Credit - Earned]	Spinak, Jane M.	3.0	A-

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6665-1	Columbia Journal of Race and Law		0.0	CR
L6231-2	Corporations	McCrary, Justin	4.0	B
L9599-1	Law School Pathways Program Development	Thomas, Kendall	1.0	CR
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A-
L6357-1	Public Health Law and Social Justice	Goldman, Janlori	3.0	A-
L8517-1	Workshop on Facilitating Meaningful Reentry	Genty, Philip M.	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6665-1	Columbia Journal of Race and Law		0.0	CR
L6241-1	Evidence	Shechtman, Paul	3.0	B+
L6474-1	Law of the Political Process	Briffault, Richard	3.0	B+
L6675-1	Major Writing Credit	Shanahan, Colleen F.	0.0	CR
L6695-1	Supervised JD Experiential Study	Genty, Philip M.	2.0	A
L6683-1	Supervised Research Paper	Shanahan, Colleen F.	1.0	CR
L6822-1	Teaching Fellows	Emens, Elizabeth F.	4.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-3	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	CR
L6108-3	Criminal Law	Liebman, James S.	3.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6369-1	Lawyering for Change	Sturm, Susan P.	3.0	CR
L6121-15	Legal Practice Workshop II	Statsinger, Steven	1.0	CR
L6118-1	Torts	Blasi, Vincent	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-7	Legal Methods II: Problem Solving for Lawyers	Katz, Avery W.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	B+
L6105-7	Contracts	Emens, Elizabeth F.	4.0	B+
L6113-2	Legal Methods	Sovern, Michael I.	1.0	CR
L6115-15	Legal Practice Workshop I	Statsinger, Steven; Yoon, Nam Jin	2.0	P
L6116-2	Property	Balganesh, Shyamkrishna	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 83.0

Total Earned JD Program Points: 83.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	James Kent Scholar	3L
2020-21	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	90.0

Columbia
Law School

Philip M. Genty
Vice Dean for Experiential Education
Everett B. Birch Clinical Professor
in Professional Responsibility

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Re: Iris Carbonel

Dear Judge:

I write to recommend Iris Carbonel, a 2022 graduate, for a judicial clerkship. I worked closely with Ms. Carbonel during her second year on a prison reentry project I oversee with two of my faculty colleagues. The project, the Paralegal Pathways Initiative, is creating a paralegal course targeted at formerly incarcerated individuals with prior experience as "jailhouse lawyers." A challenge for these individuals after release is to have their leadership assets recognized and to be able to utilize these to achieve success. We see our project as one way to address this by facilitating the participants' ability to enter the legal workplace.

In 2020-2021, we developed and ran a second cycle of an experimental version of our evening paralegal course (on Zoom). For this pilot we had recruited 12 formerly incarcerated "co-designers" who played a dual role: they experienced the course as full participants, completing all of the in-class exercises and homework assignments and engaging in the classroom discussions; and they acted as our partners by offering their honest critiques of the course's effectiveness and making valuable suggestions for improving it. The law students were crucial to the program: They were responsible for helping to develop and refine the curriculum, recruiting and supporting facilitators, participating in interactive class exercises with the co-designers, setting the agenda for our post-class debriefing meetings, and compiling our collective reflections.

Ms. Carbonel was deeply engaged in the project throughout the year. She collaborated with her law school classmates on all of the project's components. In the fall semester she shared leadership of our process for recruiting and selecting potential "co-designers." I participated in several of the interviews with her, and I observed her focus and professionalism, as well as the respect she showed the applicants and the sensitive way she interacted with them. This was also true of her involvement in the classes we conducted with the co-designers in the spring semester. She connected easily with them in the classroom.

The Paralegal Pathways Initiative is only one of the many projects with which Ms. Carbonel was involved during her time at Columbia. Throughout law school she was fully invested in work to improve the lives of others, with a particular focus on issues of discrimination and collateral consequences of criminal convictions. She was in the Immigrants Rights Clinic during the fall

of her third year, and she enrolled in the Pro Bono Scholars program in her final semester, interning with the NAACP Legal Defense Fund.

Perhaps most noteworthy was the resourcefulness she showed in co-creating the Law School Pathways Program, for which she was awarded one of Columbia's inaugural Anti-Racism Grants. The goal of this program is to make it possible for people from diverse backgrounds to attend law school. As the program description explains:

> The law school pathways program is designed to aid first generation, low-income, and minority students from the Harlem/Bronx/Uptown area who are considering attending law school.
>
> The year-long program will bring selected participants to Columbia Law School for "Saturday Academies." These sessions will feature counseling on the law school application process as well as mentorship from attorneys and law students. Participants who complete the program will receive free LSAT preparation courses, networking opportunities, and admissions advising.

This is an ambitious undertaking and an important initiative for Columbia. It would not have happened without Ms. Carbonel's vision and determination. It is remarkable that she was able to launch the program and secure a grant for it in such a short period of time.

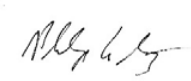
Ms. Carbonel's leadership abilities were also reflected in her service as President of First Generation Professionals in her second year and the award of a Davis Polk Leadership Fellowship. In addition, she was named a Harlan Fiske Stone Scholar for overall academic achievement, and she was selected as a Staff Editor for the *Columbia Journal of Race and Law*.

Ms. Carbonel is excited about the possibility of moving into a judicial clerkship as she begins her legal career. She wants to experience litigation from the court's perspective and to build upon the legal writing and research skills she developed during law school.

In short, Ms. Carbonel is a highly motivated individual with excellent leadership and collaborative abilities. She also has a wonderful dedication to addressing unmet legal needs and improving the legal profession. For all of these reasons, I am pleased to recommend her to you.

Please contact me if you need additional information.

Sincerely yours,



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Columbia
Law School

Elora Mukherjee
Jerome L. Greene Clinical
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Director, Immigrants' Rights Clinic

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emukherjee@law.columbia.edu

January 27, 2023

Re: Letter of Recommendation for Iris Carbonel's Clerkship Application

Dear Judge:

We enthusiastically offer this letter of support for Iris Carbonel's application to serve as a judicial law clerk in your chambers. Iris has a strong analytical approach to complex legal problems, a true commitment to the service of others, and an intellectual flexibility that enables her to look at issues from all angles. She would be an outstanding clerk. You should hire her.

Iris enrolled as a student in the Immigrants' Rights Clinic in the Fall 2021 semester. The Immigrants' Rights Clinic offers students an opportunity to engage in an intensive learning environment in which they learn about asylum law and other forms of immigration relief and take the lead in representing an asylum seeker. Students' time commitment to the clinic includes approximately five hours of seminar time each week plus about 21-hours of case-related work each week over the course of a semester.

In the Fall 2021 semester, Iris demonstrated deep respect for her clients and colleagues, and a firm dedication to strive for a fair result that incorporates kindness and humanity. Iris navigated difficult ethical terrain with compassion while honoring her professional duties as an advocate. Based on her outstanding contributions to the clinic seminar, she earned the only A+ grade we awarded to clinic students that semester. Below are descriptions of Iris' major contributions to the Immigrants' Rights Clinic:

First, Iris and her clinic student partners served as lead counsel for an HIV+ asylum seeker from Cote d'Ivoire who had suffered female genital mutilation, domestic abuse, and societal exclusion. The client's family cast her out for fleeing a forced a marriage with a much older man when she was only a child, and ostracized her further when they learned that she had had a child out of wedlock. The client fled for the United States after a man raped her and infected her with HIV. She hoped to pursue a better life for her and her infant daughter, free from violence and death.

Iris and her clinic partners met with the client several times a week in the Fall 2021 semester to carefully win her trust despite her lifetime experiences of betrayal, fear, and abuse. The team had to move quickly to draw out her life experiences, gather evidence, and prepare her for a grueling interview at the asylum office where the client would be required to recount her most painful experiences in front of an officer. The client had been scheduled for an asylum adjudication early in the semester—much sooner than any other Fall 2021 clinic cases. Compounding the urgency of the situation was that the client had never spoken to anyone about being sexually assaulted and suffering domestic violence.

These client meetings were not easy. Iris and her partners were deliberate in how they planned for and ultimately executed each difficult conversation with their client. Ultimately, the client opened up to Iris and the clinic team. Among her clinical partners, Iris showed the most empathy for our client's situation. Iris was also the most adept among the team at counseling the client in a manner that empowered her to arrive at the best decisions. Repeatedly, Iris was intentional about restoring our client's agency.

Iris also showed incredible creativity in gathering difficult-to-locate evidence and communicating with recalcitrant witnesses—many of whom were the very family members who had shunned our client. Iris worked quickly and efficiently to draft our client's affidavit, contact and secure medical, psychological, and country conditions experts, and perform extensive research on Cote d'Ivoire's treatment of HIV+ persons, women who escaped forced marriages, and unwed mothers. Iris wrote one third of an extremely complex memorandum of law that explained how the client qualified for asylum despite several obstacles. Her analysis and writing were persuasive, and she was receptive to incorporating feedback. Iris and the team then had to moot the client for her asylum interview—a process that is emotionally devastating for most clients. Iris performed all these tasks during a pandemic and through a personal health issue of her own.

Second, during IRC's weekly seminar sessions, Iris' contributions to our class discussions were among the most thoughtful and enriching. Iris thinks very deeply about the complex intersection of legal and social issues, and speaks candidly about her experiences as a Black and Latina, first-generation professional who did not come from privilege. She was consistently respectful of others' lived experiences, and approached each problem with an open mind. It was a true pleasure to have Iris in the Immigrants' Rights Clinic.

Iris has demonstrated an exceptional commitment to public service over the years. She has been active throughout law school in the Black Law Students Association and the Latinx Law Students Association. After a competitive selection process, she was selected as a New York *Pro Bono* Scholar and served with the NAACP Legal Defense Fund. She also co-founded the Pathways Program at Columbia Law School that supports first-generation, low-income, and minority students in underprivileged communities in New York City as they consider attending law school.

Both Columbia Law School and her undergraduate *alma mater*, New York University, have recognized Iris' academic and social justice achievements. She is the recipient of Columbia Law School's Anti-Racism Grant and NYU's Malcom X/Martin Luther King Jr. Leadership Award, to name a few of her much deserved accolades.

Iris' work ethic and compassion set her apart from many of her law school peers. She is deeply committed to advocating for others. She balances her serious academic and scholarly commitments with true kindness. Iris' personal and professional qualities will make her an excellent clerk and a leader in her generation of lawyers.

We would be happy to discuss Iris' application further. Please do not hesitate to contact us at your convenience.

Very truly yours,

Elora Mukherjee
Jerome L. Greene Clinical Professor of Law
Immigrants' Rights Clinic
Direct office phone: 212.854.2603
Mobile phone: 203.668.2639
emukherjee@law.columbia.edu

Amelia Wilson
Supervising Attorney
Immigrants' Rights Clinic
Direct office phone: 212.854.0171
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Columbia
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Jane M. Spinak
Edward Ross Aranow Clinical
Professor of Law

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spinak@law.columbia.edu

Re: Letter of Recommendation for Iris Carbonel Estepan

Dear Judge:

I write enthusiastically to recommend Iris Carbonel Estepan for a clerkship with you during the next several years. I have had the pleasure of teaching Iris in two courses during the 2021-2022 academic year. Since they were both small and interactive classes, I had the opportunity to observe Iris' research and writing capacity, insightfulness and work ethic. I know she will be a dedicated and effective clerk and would be a welcomed participant in your chambers.

In fall 2021, Iris was my student in my professional responsibility course, *Becoming a Lawyer*. This course accepts approximately twenty to twenty-four 2L, 3L and LLM students willing to participate in a demanding 3-credit seminar to fulfill their mandatory professional responsibility requirement. Classes include activities like court observations, reflective journals, group assignment projects, preparing for and team-teaching a class and writing a final paper.

Iris was a full participant in every aspect of the course. Her journals were forthright and carefully constructed, reflecting on the assignment's materials but also interrogating her own beliefs about professional ethics. Iris has strong political, economic and moral beliefs which she is able to share in a constructive and open-minded way. She listens carefully to what her classmates contribute and is not only prepared to see their point of view but willing to amend her own. This capacity is essential for assisting a judge in reaching the ultimate outcome of a case decision.

Iris prepared for and co-taught a class on client loyalty, drawing on the tension between loyalty to a client, responsibilities to employers and duty to the public. She and her co-teachers created several well-constructed yet humorous hypotheticals for the class to grapple with. In her reflection on being a class leader, Iris highlighted the challenges and rewards of working closely with a group on a topic that required teaching others. She noted the satisfaction of collaboration toward an effective end and also the necessity of considering all the possible ways the class might respond to their questions in order to be thoroughly prepared.

For her final paper, Iris considered the historical context of current character and fitness requirements for bar admission, noting the ambiguity and lack of transparency in character and

fitness determinations by bar examiners and courts. She also identified how little students applying to law school understand about this bar admission requirement and its potential for precluding bar admission despite an outstanding law school career. Finally, Iris explored the "Unlock the Bar" movement that urges bar examiners to eliminate questions about arrests and convictions that unduly penalize applicants from communities that are over-policed, reproducing some of the inequities that the legal profession itself is trying to rectify. Within the required ten-page limit, Iris produced a carefully researched and argued paper, well-written and persuasive.

I also had the pleasure of Iris participating in the New York State Pro Bono Scholars Program (PBS) that I taught this spring. Students in their last semester of law school sit for the New York bar examination in February and then work full-time in a public interest legal placement for approximately twelve weeks. The CLS-PBS program, which enrolled twelve students including Iris, uses the first week after the bar examination for classes and activities before the students begin their placements as well as weekly classes when work begins. Iris applied to and was chosen by the Legal Defense Fund (LDF) for her placement, a highly competitive position. Iris received a very strong review of her work from her supervisor. He noted that Iris was very capable of doing a deep dive into a hard or complex problem but also was always enthusiastic and responsible about more mundane tasks. Iris was timely and communicative about her responsibilities. At the very end of the placement, Iris was tasked with an assignment that required her to complete the research quickly and to make a presentation to a team of lawyers, which she did very well. He noted how pleased the office was with Iris' contributions.

As with the professional responsibility course, Iris was an active and enthusiastic participant in the PBS classes. She was always prepared and thoughtful in her contributions. And once again, she was willing to consider alternate views of issues and consider their impact on her own beliefs. Iris chose to consider bar admission for her final paper, this time focused on the challenges that the examination presents to students, especially students struggling with significant financial burdens that heighten the fear and cost of failure. She discussed the responsibilities of law schools to help prepare students for the examination, the changes that should be made to the examination itself – especially measuring actually lawyering skills beyond memorization – and constructing an admission process that actually protects clients. As with her earlier paper, this one was well-written and creative.

As I noted when I started, it was a true joy to have Iris in my courses this year. She is the kind of inquisitive, reflective and prepared student I could always count on to contribute to the discussion. Iris' research and writing skills were always strong but were honed even more by her placement at LDF. Because of her participation in the Immigrants' Rights Clinic, for which she received the very rarely conferred A+, Iris also brings to a clerkship client-related lawyering skills. Finally, as her CV attests, Iris has been an active and cherished part of the CLS community, serving as a TA to two of my colleagues, serving as a journal editor, and leading several student organizations or projects.

Iris will be a dedicated and responsible clerk and a valued and well-liked member of any chambers. I recommend her without hesitation, knowing well what an excellent clerk she will be.

Sincerely,

Jane M. Spinak

IRIS CARBONEL
Columbia Law School J.D. '22
617-447-7297
iris.carbonel@columbia.edu

WRITING SAMPLE

This writing sample is a memorandum written for an internship. Counsel asked me to explore whether damages may be available under the Elliott-Larsen Civil Rights Act and the Michigan Consumer Protection Act in a civil action. I received permission from the organization to use this legal memorandum as a writing sample, and it has been redacted to maintain full confidentiality. This writing sample reflects editing suggestions, but it is substantially my own work.

MEMORANDUM

To: Counsel
From: Iris Carbonel
Re: Damages Available Under Michigan State Laws
Date: May 2, 2022

Questions Presented

Are damages available under the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, et seq., and the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901, et seq., in a civil class action? If so, how much under each law?

Brief Answer

Yes, damages are available under the Michigan Consumer Protection Act or for those who bring a claim under the Elliot-Larsen Civil Rights Act in federal or state court. Under the Elliott-Larsen Act, courts award damages based on whether a person suffered an injury or loss caused by discrimination. Mich. Comp. Laws § 37.2801(3) (1976). The Elliott-Larsen Civil Rights Act also provides for the recovery of statutory damages in the form of civil fines available through §37.2605. However, this provision does not apply here because those statutory damages are only available to one who brings their complaint to the Michigan Civil Rights Commission. Under the Michigan Consumer Protection Act, courts award damages based on whether a person suffered a loss as a result of a violation of the act. Mich. Comp. Laws § 445.911(4) (1976).

[Statement of Facts Omitted]

Analysis

I. Damages Available Under the Elliott-Larsen Civil Rights Act

The Elliott-Larsen Civil Rights Act (ELCRA) defines civil rights and prohibits discriminatory practices, policies, and customs based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status. Mich. Comp. Laws § 37. The Elliott-Larsen Act provides two avenues for relief. First, a person may file a complaint with the Michigan Civil Rights Commission. Mich. Comp. Laws § 37.2602(c). If the Commission determines that the respondent has violated ELCRA, the statute provides that damages may be awarded for injury or loss to the complainant, including a reasonable attorney's fee. Mich. Comp. Laws § 37.2605(2)(i). The Commission may also order payment of a civil fine for violation of §37.2605 of the Act, ranging from $10,000 to $50,000 depending on the number of violations. Mich. Comp. Laws § 37.2605(2)(k). Because I was asked to evaluate damages in a civil action, this avenue for relief is inapplicable.

Second, a person may bring a civil action. Mich. Comp. Laws § 37.2801. Under §37.2801, a person may bring a civil action for appropriate injunctive relief, damages, or both. Damages include recovery for injury or loss caused by each violation of the act, including reasonable attorney's fees. Mich. Comp. Laws § 37.2801(3). Courts have concluded that compensatory and exemplary damages may be recovered under §37.2801. *Moll v. Parkside Livonia Credit Union*, 525 F. Supp. 786, 790 (E.D. Mich. 1981); *Freeman v. Kelvinator, Inc.*, 469 F. Supp. 999, 1004 (E.D. Mich. 1979). In Michigan, exemplary damages are distinct from punitive damages in that "exemplary damages are recoverable as compensation to the plaintiff, not as punishment to the defendant." *Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 419 (Mich. 1980).

Compensatory and exemplary damages include recovery for pain, suffering, and emotional distress arising out of an incident of discrimination. *Freeman*, 469 F. Supp. at 1003-04 (holding that pain and suffering stemming from the "indignity and anguish of discrimination" qualifies as an injury or loss under §37.2801); *Kewin*, 409 Mich. at 419 (citing *McFadden v. Tate*, 350 Mich. 84 (Mich. 1953))("An award of exemplary damages is considered proper if it compensates a plaintiff for the 'humiliation, sense of outrage, and indignity' resulting from injuries 'maliciously, wilfully and wantonly' inflicted by the defendant."). In *Freeman v. Kelvinator, Inc.*, the court was deciding a motion to amend the complaint because the plaintiffs sought to add a prayer for compensatory and exemplary relief under ELCRA. *Id*. at 999. The defendant argued that the damages plaintiffs sought for the indignity of discrimination, humiliation, and the invasion of their right not to be discriminated were barred by the exclusive remedy provision of the Michigan Worker's Disability Compensation Act (MWDCA). *Id*. The court disagreed, specifically noting that the injury that flows from discrimination is unique and not akin to the mental injuries sustained by workers. *Id*. at 1000. In determining whether the damages plaintiffs sought were recoverable under ELCRA, the court interpreted loss under §37.2801(3) to include "pecuniary losses in the form of lost opportunity and backpay," and injury to include additional recovery for damages in excess of pecuniary loss. *Id*. at 1004. The court cited the act's language in reaching this conclusion and noted that ELCRA's broad remedial purpose demands such a conclusion to achieve a "just result." *Id*.

In *Moll v. Parkside Livonia Credit Union*, the plaintiff sought to recover back pay and compensatory and punitive damages under ELCRA. *Moll*, 525 F. Supp. at 787. The compensatory damages were meant to "cover the mental anguish that the plaintiff suffered from the alleged discrimination," and the punitive damages were to "compensate the plaintiff

for the humiliation and embarrassment that stemmed from the alleged discrimination." *Id*. The defendant moved for a judgment on the pleadings on both categories of damages under ELCRA. *Id*. On the question of compensatory damages, the court agreed with the court in *Freeman* and denied defendant's motion on the issue. *Id*. at 790.

On the punitive damages question, the court clarified that punitive damages, that is damages designed to punish, are not recoverable. *Id*. at 790. However, the court noted that in the present case, though plaintiffs requested punitive damages, the court considered plaintiffs to actually be seeking compensatory damages. *Id*. Specifically, the court clarified that plaintiff sought the "damages that occurred in the form of degradation, humiliation and embarrassment that flowed from the alleged sex discrimination." *Id*. The court held that where humiliation and degradation flow from the alleged discrimination, plaintiff may recover damages to compensate for her hurt feelings. *Id*. As such, the court denied the defendant's motion on this issue as well because, in effect, the plaintiffs were not seeking punitive damages but rather compensatory damages.

Though punitive damages are disallowed, courts have interpreted injury or loss under ELCRA to include pain, suffering, degradation, and humiliation caused by discrimination, and they have concluded that compensatory and exemplary damages (nonpunitive) may be awarded accordingly.

II. Damages Available Under the Michigan Consumer Protection Act

The Michigan Consumer Protection Act (MCPA) prohibits certain methods, acts, and practices in trade or commerce, including unfair, unconscionable, or deceptive conduct, among other things. Mich. Comp. Laws § 445. Section 445.911(1) of the Michigan Consumer Protection

Act allows a person to bring an action to (a) obtain a declaratory judgment that a method, act, or practice is unlawful under §445.903 and/or (b) enjoin a person who is engaging or is about to engage in a method, act, or practice that is unlawful under §445.903. In addition, §445.911(4) allows a person who suffers loss as a result of a violation of this act to bring a class action in certain circumstances, such as where actual damages were caused by a method, act, or practice in trade or commerce defined as unlawful under §445.903 of the act. Finally, §445.911(5) gives the court various options for relief in actions brought under §445.911(4), including the option to: "(a) reimburse persons who have suffered damages; (b) carry out a transaction in accordance with the aggrieved persons' reasonable expectations; (c) strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; (d) grant other appropriate relief."

There are no statutory damages available for an individual bringing a class action under the MCPA. Mich. Comp. Laws § 445.911(2). Instead, a court that finds liability must determine "actual damages" under §445.911(4). To recover damages, a plaintiff must have suffered a loss as a result of a violation of the MCPA. Mich. Comp. Laws § 445.911(4). For example, in *Daenzer v. Wayland Ford, Inc.*, the plaintiff filed a class action against defendant Wayland Ford, a car dealership, for its alleged deceptive practices when entering into sales contracts. 193 F. Supp. 2d 1030, 1034 (W.D. Mich. 2002). Specifically, the plaintiff claimed that the defendant violated the Michigan Consumer Protection Act. *Id.* at 1035. The court held that the class may only recover actual damages because statutory damages are unavailable for class actions per §445.911(2). *Id.* at 1040.

Courts require a finding of loss to grant actual damages. Decisions in non-class action cases may be instructive in the court's analysis of loss resulting from a violation of the MCPA.

In *Galecka v. Savage Arms, Inc.*, the plaintiff purchased a firearm from the defendant, and the plaintiff believed that the firearm had a manufacturing or design defect, so he took it to the defendant for a safety inspection. No. 313350, 2014 Mich. App. LEXIS 1224, at *1 (Mich. Ct. App. June 26, 2014). The defendant returned the firearm to plaintiff and communicated that the firearm was safe for use without needing any repairs or modifications. *Id*. The plaintiff suspected that the defendant had replaced the barrel of the firearm, but the defendant denied having done so. *Id*. Plaintiff claimed that the defendant's secret barrel replacement violated the MCPA. *Id*. at *2. The court affirmed the trial court's holding that the plaintiff did not suffer a loss for the purposes of §445.911(2) because the plaintiff's firearm was not in worse shape, any less desirable, or less valuable after the safety inspection. *Id*. at *5.

Explaining the rule, the court in *Galecka* wrote, "to recover damages for a 'loss' under §445.911(2), a plaintiff must satisfy 'the common-law requirement of injury.'" *Id*. at *4. This injury does not have to affect the plaintiff's pocketbook, and it may instead consist of the plaintiff's unfulfilled expectations. *Id*. The court added that when "the plaintiff proves frustration of his or her expectations, 'the plaintiff may recover the difference between the actual value of the property when the contract was made and the value that it would have possessed if the representations had been true.'" *Id*. at *4-5.

On the other hand, following the same rule, the court in *Mayhall v. A.H. Pond Co.* held differently. There, the plaintiff claimed that he purchased a ring from the defendant, who allegedly engaged in deceptive practices when selling the plaintiff the ring by misrepresenting it as containing perfect diamonds. 129 Mich. App. 178, 180 (Mich. Ct. App. 1983). The sole issue for the court on appeal was determining whether the plaintiff had suffered a "loss" under the MCPA §445.911. *Id*. The court concluded that the defendant's misrepresentation of the ring and

plaintiff's reliance on that representation frustrated plaintiff's expectations because "plaintiff purchased the ring expecting it to be perfect, that such expectation was created by the defendant's actions, that plaintiff did not receive what he expected, and that the frustration of his expectations was the result of the activity on the part of the defendants." *Id*. at 186. This frustration of the plaintiff's expectations constituted an injury, and, therefore, a loss under § 445.911 of the MCPA. *Id*. at 185-86.

The court in *Galecka* distinguished the facts in that case from those in *Mayhall*. The court found that, unlike in *Mayhall*, the plaintiff in *Galecka* did not "show that he had any expectation regarding what would happen to the firearm or that any expectation he may have had was not met." *Galecka*, 2014 Mich. App. LEXIS 1224, at *6. The court found that the plaintiff's only expectation in *Galecka* was that he would receive a safe version of the firearm in return, and the plaintiff did not allege that the modified firearm was unsafe. *Id*. Thus, unlike *Mayhall*, the plaintiff's expectations were not unfulfilled or frustrated, and, therefore, do not amount to an injury or loss. *Id*.

In conclusion, under the MCPA, to award damages, a court must find that a plaintiff suffered a loss arising out of a violation of the MCPA. In assessing loss, courts have looked to whether the plaintiff suffered an injury, including frustration or unfulfillment of a plaintiff's expectations.

Conclusion

Both ELCRA and the MCPA provide an avenue for recovering damages. In this case, statutory damages are not recoverable under ELCRA because statutory damages are only available to one who brings his complaint through the Michigan Civil Rights Commission. However, a plaintiff who brings a claim under ELCRA in a civil action may recover damages for

an injury or loss suffered because of discrimination. Courts have interpreted injury or loss to include pain, suffering, degradation, and humiliation caused by discrimination. A plaintiff in a class action may recover actual damages under § 445.911(4) of the MCPA if the court finds that the plaintiff suffered a loss as a result of a violation of the act.

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WRITING SAMPLE

This writing sample is a final paper written for my Access to Justice Seminar, and it is entirely my own work. The paper explores how the imposition of fees and fines amounts to the criminalization of poverty, and how the enforcement of these fees and fines contributes to the continued use of unconstitutional debtors' prisons. In addition, the paper examines the use of fees and fines as a revenue-making industry for state and local governments and the policing effects this has on communities of color.

Iris Carbonel
Access to Justice
Final Paper

Fees and Fines: A Lose/Lose Game

This Fall, *Squid Game* captivated Netflix aficionados across the United States. The dystopian Korean drama showcased gory displays of violence in a shocking competition for a money prize. The competitors, each choosing to participate in a series of games, put their lives on the line for a chance to win, the unspoken consensus being that death itself was better than to continue living in their crushing debt. The underlying social commentary in *Squid Game* begs the question of whether the disturbing storyline is really so dystopian or closer to the truth than we care to admit. The way our states criminalize poverty is not so different. Through the imposition of overwhelming fees and fines, indigent individuals are forced to choose between their freedom and their life.

Debtors' prisons, which date back to medieval England, were designed to incarcerate people who were unable or unwilling to pay their debts, with the goal of eventually coercing payment. Through a series of decisions, the Supreme Court of the United States has effectively banned debtors' prisons, holding them unconstitutional. The first of these cases, *Williams v. Illinois*, raised the question of whether an indigent defendant may be held in confinement beyond the maximum term of his sentence due to his failure to pay the fees and fines imposed in his sentence.[1] In that case, the Court held that to hold him in confinement beyond this maximum term limit would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment because such imprisonment would flow directly from his inability to pay and nothing more.[2]

[1] *Williams v. Illinois*, 399 U.S. 235, 236 (1970).
[2] *Id.*

Shortly after, the Supreme Court decided *Tate v. Short*. There, the defendant was charged fines for traffic convictions, but he was unable to pay because he could not afford it.[3] In turn, the lower court converted the fine into prison time, and the defendant had to serve eighty-five days in custody.[4] The Supreme Court held that the defendant's "imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination" as *Williams* because the defendant was subjected to imprisonment solely because of his indigency.[5]

Finally, in 1983, the Supreme Court decided *Bearden v. Georgia*. There, the defendant was sentenced to probation, conditioned on payment of a fine and restitution.[6] The defendant was ultimately unable to pay the debt, so the trial court revoked his probation and sentenced him to prison.[7] The Supreme Court held that probation cannot be automatically revoked for failure to pay a fine or restitution without first determining that the individual had not made sufficient efforts to pay or that adequate alternative forms of punishment did not exist.[8] *Bearden* is significant because it instructed courts to conduct an inquiry into an individual's reasons for failure to pay during revocation proceedings, and, if the lack of payment was unwilful, it prohibited courts from turning to imprisonment without first considering alternative measures of punishment.[9] The Court concluded that depriving the defendant of this conditional freedom is contrary to the fundamental fairness required by the Fourteenth Amendment.[10]

Through these three cases, the unconstitutionality of debtors' prisons is settled law. However, debtors' prisons continue to exist in some form today. Across the country, there are

[3] Tate v. Short, 401 U.S. 395, 396 (1971).
[4] *Id*. at 396-97.
[5] *Id*. at 397-98.
[6] *Bearden v. Georgia*, 461 U.S. 660, 662 (1983).
[7] *Id*. at 663.
[8] *Id*. at 661.
[9] *Id*. at 672.
[10] *Id*. at 673.

countless stories of individuals facing incarceration for their inability to afford fees and fines. In Ferguson, a woman received two parking tickets that, at the time, totaled $151 plus fees.[11] Seven years later, she still owed the city $541 after having already paid $550 in fines and fees, having had multiple arrest warrants issued against her, and having spent time in jail on several occasions.[12] In Georgia, Tom Barrett was sentenced to twelve months after he stole a can of beer worth $2.[13] The actual shoplifting charge had no jail time.[14] Instead, he was incarcerated for his inability to afford the $12 a day rental fee for the electronic monitoring device that he was forced to wear as a condition of his release.[15] In Michigan, 19-year-old Kyle Dewitt caught a fish out of season and had to spend three days in jail because he could not afford the original $155 fine.[16] These are just a few examples of the many people who have fallen victim to modern day debtors' prisons despite their unconstitutionality.

The rise of modern day debtors' prisons is due in part to the increase in prison population in the United States following tough-on-crime policies, such as the war on crime and the war on drugs.[17] The overpopulation in prisons increased states' costs of running prisons from $6 billion in 1980 to more than $67 billion a year in 2010.[18] At the same time, the fiscal crisis of the 2000s created pressure for state and local governments to seek alternative ways to save and increase

[11] U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T, at 4 (Mar. 4, 2015) [hereinafter DOJ Ferguson Report], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
[12] *Id.*
[13] *Guilty and Charged: Profiles of Those Forced to Pay or Stay*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/310710716/profiles-of-those-forced-to-pay-or-stay.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Joseph Shapiro, *As Court Fees Rise, The Poor are Paying the Price*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.
[18] *Id.*

revenue in the face of budget deficits without increasing taxes.[19] In an effort to be self-sufficient, state and local governments "increased fines and court costs, intensified law enforcement efforts, and passed so-called pay-to-stay laws that charge offenders daily jail fees" as a way to ensure that the criminal justice system would pay for itself. These fees and fines shifted the responsibility of funding the criminal legal system from taxpayers to the defendants, who are seen as the users of the courts.[20]

As a result of these changes, governments drove up fines[21] and began charging fees at every step of the criminal legal process, including for services that were once free.[22] For instance, in at least 43 states and Washington DC, a defendant can be billed for a public defender.[23] These public defender fees discourage people from seeking representation and subvert and erode the purpose of *Gideon v. Wainwright* in ensuring access to the courts.[24] Other fees include room and board for jail and prison stays. In one instance, Ms. Leann Banderman from Missouri spent thirty days in jail for stealing $24.29 worth of nail polish, and, upon her release, received a bill for $1,400 for the cost of her stay.[25] Fees could also include probation and parole supervision, arrest warrants, jury trials, community service, among many other services.[26]

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[19] Hannah Rappleye & Lisa Riordan Seville, *The Town that Turned Poverty into a Prison Sentence*, THE NATION (Mar. 14, 2014), https://www.thenation.com/article/archive/town-turned-poverty-prison-sentence/; Shapiro, *supra* note 17; Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. Miami Race & Soc. Just. L. Rev. 1, 3 (2020).
[20] MATTHEW MENENDEZ, ET AL., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES (2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines.
[21] Shapiro, *supra* note 17; Foster, *supra* note 19.
[22] Shapiro, *supra* note 17.
[23] *Id.*
[24] ROOPA PATEL & MEGHNA PHILIP, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION (2012), https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-toolkit-action.
[25] Foster, *supra* note 19, at 7.
[26] Shapiro, *supra* note 17.

The fees and fines scheme became a revenue making process for state and local governments, which came at the expense of low-income communities of color. The Ferguson Report revealed that the city's focus on producing and maximizing revenue resulted in unconstitutional policing of Black communities. The Ferguson Police Department, feeling the city's pressure to increase revenue through citations, routinely engaged in a pattern of unconstitutional stops and arrests and excessive force in violation of the Fourth Amendment and engaged in other unconstitutional behavior, usually at the cost of communities of color. [27] In general, Black drivers are thirty-one percent more likely to be stopped by law enforcement than white drivers, and people of color are more likely to be given a ticket and to receive multiple tickets than white drivers.[28] In Buffalo, the traffic stops used to generate revenue for the city principally targeted people of color.[29]

Clearly, law enforcement overwhelmingly targets communities of color in their policing practices, and the added pressure of raising revenue through citations only makes those targeted attacks more prominent. The state effectively allows police officers to go great lengths, including allowing them to violate people of color's constitutional privileges as long as they are able to meet the state's quotas for internal fundraising. In addition, officers in Ferguson aggressively issued multiple citations during any given stop for the same violation, often issuing three or four charges and sometimes as many as fourteen.[30] This harmful practice of charging exorbitant fines in communities of color that usually trap people in cycles of poverty and incarceration undeniably erode the community's trust in law enforcement and the criminal legal system at large. It also prevents Black people and other people of color from bridging the wealth gap.

[27] DOJ Ferguson Report, *supra* note 11, at 2.
[28] Foster, *supra* note 19, at 11.
[29] *Id*. at 14.
[30] DOJ Ferguson Report, *supra* note 11, at 11.

Moreover, the municipal court's participation in this revenue scheme raises significant concerns over conflict of interest and the court's ability to perform its duties as an institution of justice. A municipal court concerned with maximizing revenue for the local government undermines a defendant's due process right, as the court's financial interests are in direct conflict with the defendant's liberty and literal livelihood. The defendant's opportunity for a fair trial becomes nonexistent if the Court's primary purpose and motivation is to extract money from the defendant by any means necessary.

The consequences of nonpayment are severe. For those who fail to pay a fine, it may mean incarceration. For those re-entering into society, the overwhelming criminal justice debt that comes with the compounded fees creates incredible hurdles to reintegration, making recidivism all the more likely. Criminal justice debt affects people's credit scores, which, by extension, can make it incredibly difficult to secure housing or employment.[31] Credit scores are used as a screening mechanism for loan, mortgages, and rental housing,[32] and a history of criminal justice debt may scare off lenders and landlords. Likewise, employers' background checks often include a credit check, which may reveal criminal history that they otherwise may not have access to.[33]

Criminal justice debt may also make it difficult to obtain public benefits, meet financial obligations such as child support, and exercise the right to vote, as many states require full payment of fees prior to receiving voting privileges.[34] In addition, aggressive collection tactics may mean unstable employment if an individual cycles in and out of jail for nonpayment of fines

[31] ALICIA BANNON, ET AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY, at 27 (2010), https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-barrier-reentry.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 28-29.

and fees. Finally, a significant collateral consequence of nonpayment is license suspension, which makes it difficult to travel to work, transport children to school, or even make court appearances.[35] Because driving is a necessity for many, people choose to continue driving even with a suspended license, which can create more issues with law enforcement if stopped.[36] However, the alternative would be to risk losing their job, which would then lead to future nonpayment, still putting them at risk for incarceration. It is a lose-lose game.

These excessive fees and fines directly obstruct justice, as they force indigent people to choose between their liberties and their livelihoods, without court actors ever conducting an inquiry as to whether these individuals even have the financial means to afford them, bringing into question the integrity of the court. *Bearden* required that courts engage in ability-to-pay inquiries prior to incarceration. However, many judges rarely ever conduct them.[37] When they do, we see great discrepancies in the decision-making because judges have different criteria for determining indigency. For instance, some judges find willfulness when a defendant smokes cigarettes or does not give up their phone service in order to pay his debt.[38] Others find willfulness in nonpayment when the defendant sports a "flashy jacket or expensive tattoos."[39] Some judges expect that a defendant will have exhausted all means of securing income, such as collecting and returning used soda cans and bottles, asking family and friends for loans, or using Temporary Aid to Needy Family checks, Social Security disability income, veterans' benefits or

[35] Foster, *supra* note 19, at 19-20.
[36] *Id*. at 20.
[37] Menendez, *supra* note 20.
[38] Shapiro, *supra* note 17.
[39] Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015), https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq.

other welfare checks to pay their court fees first.[40] Because *Bearden* failed to clearly describe indigency and willfulness, judicial discretion is required to fill in those gaps. However, without a guiding standard, these judicial decisions can be arbitrary, unreasonable, and tainted by implicit biases.

Recognizing the importance of guidance, the American Bar Association suggested factors that should be considered in ability-to-pay hearings, including receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness; health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person's ability to pay; and whether payment would result in manifest hardship to the person or dependents.[41] These factors provide a good starting point for standardizing the process and ensuring that there is some predictability and consistency in how judges across the country understand indigency and willfulness when conducting *Bearden* hearings.

Alabama has taken steps in the right direction by clarifying standards for indigence. In 2014, a federal judge in Alabama approved a legal settlement between the city of Montgomery and plaintiffs who had been incarcerated for their inability to pay court fines and fees.[42] The city

[40] *Id.*; Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons.
[41] TEN GUIDELINES ON COURT FINES AND FEES, ABA (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf.
[42] Joseph Shapiro, *Alabama Settlement Could Be Model For Handling Poor Defendants In Ferguson, Mo.*, NPR (November 20, 2014), https://www.npr.org/sections/thetwo-way/2014/11/20/365510846/alabama-settlement-could-be-model-for-handling-poor-defendants-in-ferguson-mo.

agreed to "set a clear standard for municipal courts to determine whether someone is too poor to pay court fines and fees."[43] The new standard provided that people "with income at 125 percent of the federal poverty level, which amounts to less than $24,000 for a family of four, now will be considered indigent."[44] The shortcoming in this solution, however, is that it completely erases judicial discretion, which might be beneficial when an individual does not neatly fall into this income metric but would still, otherwise, qualify as indigent by other standards. This metric also fails to take into account differences in cost of living in different places, and in a city as expensive as New York City, the scope of indigency might be wider.

From a litigation perspective, the first initial issue in the criminalization of poverty through fees and fines is that courts are disregarding *Bearden* by not conducting the proper ability-to-pay inquiries prior to incarcerating individuals for nonpayment. The Department of Justice has distributed guidelines to court leaders, reminding them that (1) they must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful, and that (2) they have an obligation to indigency inquiries throughout the life of a case in order to account for changes in someone's financial circumstances.[45] Reminders such as this one are important because they emphasize what the law and the Constitution require of judges and court leaders when making these decisions. Alternatively, if the courts continue to disregard *Bearden* hearings, lawsuits against those judges and courts may serve as a reminder of their duty to the people and the Constitution.

[43] *Id.*
[44] *Id.*
[45] Letter from U.S. Dep't of J. to State and Local Courts, at 3 (Mar. 14, 2016), https://finesandfeesjusticecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf.

From a policy perspective, the biggest issue is that local governments institute fines and fees as a primary means of funding their annual budgets. The initial drive for turning to fees and fines for funding was rooted in a desire to spare taxpayers an increase in state and local taxes by instead placing the burden of financing the criminal legal system on those who use it. However, that logic is rooted in the misconception that the criminal legal system only serves those who go to court or face incarceration, as if they are consumers of a voluntary service. The reality is that the criminal legal system serves a greater public service of maintaining public safety. Therefore, even if the average taxpayer is not navigating the criminal legal system herself, she still benefits from its work and should, therefore, also be accountable for financially contributing to its functioning. Moreover, the idea that the burden will only fall on users of the criminal legal system is flawed because many taxpayers who are not themselves navigating the criminal legal system are still forced to financially contribute if a family member is incarcerated. Because Black and brown communities are overrepresented in the criminal legal system, the financial burden thus falls on those already vulnerable communities.

Additionally, states' use of fees and fines to fund the criminal legal system because they are unable to bear the costs of the increased spending that comes from running overpopulated prisons presents another significant issue. Rather than reimagining revenue schemes for funding the system as it continues to grow, states should instead reevaluate their laws so that sentencing guidelines do not lead to unnecessarily long prison terms and the offenses that currently lead to prison time actually warrant incarceration. The current practice of incarcerating people for nonpayment is counterproductive and not actually maximizing the state's revenue. The reality is that people who are incarcerated for unwilful nonpayment cannot afford to pay the fees and fines that are being imposed. By incarcerating them, the court system and the state are assuming the

costs of these individuals' prison stays even if they ultimately charge the individuals for them. In the end, it could potentially be more cost effective to assign fees and fines on a sliding scale in accordance with people's ability to pay. In doing so, the state might actually receive payment and will not waste money keeping people in jail indefinitely hoping that they will pay money that they do not have. If someone is not able to pay a fee, the court should be able to waive it, and if a person is not able to pay a fine, the court should consider alternatives to incarceration that will still hold people accountable for any wrongdoing for the sake of future deterrence.

Local and state governments should not evade constitutional bounds to raise money for state services and internal budgets. To disregard the egregious effects that these revenue schemes have in communities of color specifically is deplorable. There is no reason why one group of individuals should have to be crushed with overwhelming debt in order to sustain the state's budgetary goals. It is the state's duty to ensure its ability to function, and if it is strapped for resources, it has various alternatives for (re)allocating funds. For one, it can reflect on how to adapt state laws to reduce overcrowding in prisons and lower the costs of maintaining the criminal legal system. It can hold state courts accountable in ensuring that judges are not contributing to the overpopulation of jails and prisons by wrongfully incarcerating folks for their inability to pay fees and fines. It can choose to tax the general population accordingly for services like the courts, which benefit the public good. Local and state governments have many tools at their disposal for addressing budgetary restraints, and it should never come at the expense of the life or liberty of a citizen of that state.

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Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Block, Sharon
sblock@law.harvard.edu
617-495-9265
Lopez, David
david.lopez@law.rutgers.edu
8623018898
Sachs, Benjamin
bsachs@law.harvard.edu
617-384-5984

References

Professor Benjamin I. Sachs, bsachs@law.harvard.edu, (617) 384-5984
Professor Sharon K. Block, sblock@law.harvard.edu, (202) 302-1801
Professor P. David Lopez, pdlopez@law.harvard.edu, (973) 353-5551

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JULIO QUIROZ COLBY
3 Linnaean St. #2 • Cambridge, MA 02138 • (281) 389-0659 • jcolby@jd24.law.harvard.edu

July 5, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

Dear Judge Davis:

I am writing to apply for a clerkship in your chambers for the 2024 term. I am currently a rising third-year law student at Harvard Law School and the Developments in the Law Chair of the *Harvard Law Review*.

Attached please find my resume, law school transcript, two writing samples, and recommendation letters from the following professors:

- Professor Benjamin I. Sachs, bsachs@law.harvard.edu, (617) 384-5984
- Professor Sharon K. Block, sblock@law.harvard.edu, (202) 302-1801
- Professor P. David Lopez, pdlopez@law.harvard.edu, (973) 353-5551

The first writing sample is a Comment that appeared in the April 2023 issue of the *Harvard Law Review* and concerns federal preemption of California's Fast Food Accountability and Standards Recovery Act (FAST Act). As an aspiring public interest lawyer, I am particularly interested in clerking on a circuit court to learn how federal judges address novel questions of law raised by policies like the FAST Act and to understand how those decisions impact working people.

If there is any other information that would be helpful to you, I would be happy to provide it. Thank you for your time and consideration.

Sincerely,

Julio Colby

Enclosures

JULIO QUIROZ COLBY

3 Linnaean St. #2 • Cambridge, MA 02138 • (281) 389-0659 • jcolby@jd24.law.harvard.edu

EDUCATION

Harvard Law School, Cambridge, MA
Candidate for J.D., May 2024
Honors: *Harvard Law Review*, Developments in the Law Chair
Activities: Professor Kristin Stilt, Teaching Assistant (Property Law)
La Alianza, Public Interest Chair
Law and Social Change Program of Study, Student Fellow
OnLabor, Student Contributor

The University of Texas at Austin, Austin, TX
B.A. with Honors in International Relations and Global Studies, May 2019
Honors: Posse Foundation Full Tuition Leadership Scholarship
Activities: Semester abroad and independent research project at Tecnológico de Monterrey Ciudad de México, Mexico

PUBLICATIONS

Recent Legislation, *CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023)*, 136 HARV. L. REV. 1748 April 2023

EXPERIENCE

Office of Senator Elizabeth Warren, Washington, D.C. Summer 2023
Legal Fellow
Preparing decision memoranda for Senator recommending she cosponsor bills, sign on to letters, and support or oppose legislation and nominees; composing oversight letters sent from Senator's desk to government agencies and private parties; designing legislative and oversight strategy to address prison health conditions; and building out policy toolkit for market consolidation in agricultural industry.

Center for Labor and a Just Economy, Cambridge, MA Spring 2023–Present
Research Assistant to Professors Sharon Block and Benjamin I. Sachs
Preparing memorandum outlining federal constitutional limits to state legislation absent federal labor law preemption.

Harvard Immigration and Refugee Clinic, Cambridge, MA Spring 2023
Clinical Student
Working directly with clients in a variety of immigration proceedings, including preparing minors for asylum add-on petition interview, drafting affidavit of supporting witness to include in supplemental filing, and preparing client for direct- and cross-examination questions for asylum hearing in immigration court.

Southern Migrant Legal Services, Nashville, TN Summer 2022
Legal Intern
Assisted in all stages of pre-trial litigation at farmworker employment law legal aid including direct Spanish-language outreach to migrant farmworkers across Southeastern US; completing new client intakes; meeting with potential clients and completing internal case evaluation memoranda; assembling discovery responses; deposition note-taking and analysis for summary judgment motion; building proof chart; preparing for settlement conference; and submitting subpoenas and FOIA requests. Completed research memoranda on NLRA retaliation protections and post-dissolution corporate liability for ongoing litigation.

Harvard Law School, Cambridge, MA Summer 2022
Research Assistant to Visiting Professor P. David Lopez
Analyzed provisions, mechanisms, and commitments in the United States-Mexico-Canada Agreement for research memorandum identifying new protections for labor organizing and employment discrimination in Mexico and the United States.

Harvard Advocates for Human Rights, Cambridge, MA Fall 2021
Sovereign Immunity Project Team Member
Conducted independent legal research and drafted comparative law memorandum on countries' compliance with International Court of Justice decisions to be used by a human rights NGO seeking to enforce a judgment against a sovereign nation.

CS DISCO, Inc., Austin, TX Summer 2019–Summer 2021
Revenue Operations Analyst II
Led software implementation for eDiscovery professional services department supporting four teams with differing needs and nearly 100 users. Recruited to ten-person taskforce led by CEO to critically deconstruct, analyze, and build desired state of business processes, metrics, and systems.

Refugee and Immigrant Center for Education and Legal Services (RAICES), Austin, TX Fall 2018
Legal Intern
Translated and transcribed clients' verbal declarations and written legal documents to be used in asylum proceedings. Compiled and maintained client files for immigration attorney. Created presentation to explain U.S. immigration system processes to clients.

PERSONAL

Native speaker of English and Spanish, limited French and Portuguese
Passionate guitarist, follower of international politics and Eastern philosophy, avid jazz and indie music fan

Harvard Law School

Date of Issue: June 2, 2023
Not valid unless signed and sealed
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Record of: Julio Q Colby
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 5 Sachs, Stephen	H	4
1001	Contracts 5 Bar-Gill, Oren	H	4
1002	Criminal Law 5 Natapoff, Alexandra	H	4
1006	First Year Legal Research and Writing 5A Toomey, James	P	2
1005	Torts 5 Goldberg, John	P	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1054	Advocacy: The Courtroom and Beyond Gershengorn, Ara	CR	2

Winter 2022 Total Credits: 2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 5 Gersen, Jeannie Suk	P	4
3107	Critical Corporate Theory Lab Hanson, Jon	H	2
1006	First Year Legal Research and Writing 5A Toomey, James	P	2
1003	Legislation and Regulation 5 Rakoff, Todd	P	4
1004	Property 5 Mack, Kenneth	H	4

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 36

Fall 2022 Term: September 01 - December 31

3176	A Democracy Initiative Lessig, Lawrence	H	2
2000	Administrative Law Freeman, Jody	P	4
8052	Animal Law & Policy Clinic Meyer, Katherine	WD	0
2142	Labor Law Sachs, Benjamin	H	4
2067	Organizing for Economic Justice in the New Economy Block, Sharon * Dean's Scholar Prize	H*	2

Fall 2022 Total Credits: 12

Winter 2023 Term: January 01 - January 31

2330	International Labor Migration Rosenbaum, Jennifer	H	2

Winter 2023 Total Credits: 2

Spring 2023 Term: February 01 - May 31

8020	Harvard Immigration and Refugee Clinic Ardalan, Sabrineh	H	3
2115	Immigration and Refugee Advocacy Ardalan, Sabrineh	H	2
3139	Law and the Legal System through the Lens of Latinx/a/o Communities Lopez, P.	H	2
2212	Public International Law Blum, Gabriella	H	4

Spring 2023 Total Credits: 11
Total 2022-2023 Credits: 25

Fall 2023 Term: August 30 - December 15

2897	Contemporary Issues in Constitutional Law Liu, Goodwin	~	2
2069	Employment Law Sachs, Benjamin	~	4
2079	Evidence Rubin, Peter	~	2
2169	Legal Profession Gordon-Reed, Annette	~	3

Fall 2023 Total Credits: 11

Spring 2024 Term: January 22 - May 10

2050	Criminal Procedure: Investigations Natapoff, Alexandra	~	4
8043	Crimmigration Clinic Torrey, Philip	~	3

Spring 2024 Total Credits: 7

continued on next page

Harvard Law School

Record of: Julio Q Colby

Date of Issue: June 2, 2023
Not valid unless signed and sealed

Total 2023-2024 Credits:	18
Total JD Program Credits:	79

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

July 05, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Julio Colby to be your clerk. I am excited to share with you my support for Julio's application for a clerkship with you. I have had the opportunity to observe Julio's work in a number of settings and have come to admire his dedication to studying the law for the purpose of advancing workers' rights and pursuing social change. Even a quick skim of Julio's transcript reveals the depth of his commitment to these issues and to taking advantage of all the opportunities that Harvard Law School provides to advance them.

I was fortunate to have Julio as a student in a seminar I teach on ways that workers are organizing outside of the traditional labor movement. The class required extensive reading and synthesizing different kinds of accounts of worker power building. In every class we would analyze the theory of change represented by the activity of the workers at the center of that class's study, the legal support or challenge for the activity and the practical impact of the activity. I was impressed by Julio's ability to switch back and forth between analysis of theory and practice. Some of his classmates were clearly more comfortable in one realm or the other. Julio was able to make valuable contributions throughout.

Most importantly, I appreciate Julio's rare ability to be an active and valuable contributor to the discussion but not to dominate it. It is always a challenge in a classroom to maintain a balance among participants and to keep the conversation moving. I think the ability to know when to step up and step back is a particularly important skill for a social justice lawyer. I believe it would be a skill that you would value in chambers.

Julio submitted an excellent paper and final project for the seminar. Based on the combination of his thoughtful contributions to class discussions and the superior quality of his paper and final project, Julio earned a Dean's Scholar Prize in my class – the highest grade a classroom professor can grant at HLS.

During this past year, I also had the opportunity to work with Julio on a piece he wrote for the Harvard Law Review. Julio wrote an essay on the Fast Food Accountability and Standards Recovery Act, which was enacted in California last year. Julio's "Recent Legislation" essay focused on the likelihood that the FAST Act would withstand challenge on the basis that it is preempted by federal labor law. He did an excellent job of explaining this novel legislation, articulating the different strains of federal labor law preemption and then predicting how courts would apply the one to the other. Because the FAST Act is a new model of legislation, Julio's piece required him to project and extrapolate from doctrine that was developed in different circumstances. I found Julio very open to discussing his early drafts of the essay. He did a very good job of incorporating suggestions and sharpening his analysis. This experience again suggests that he would be good collaborator for you in chambers.

Finally, Julio has undertaken a research project for me, examining how federal Constitutional rights would apply to labor organizing in the absence of protection for such rights under federal labor law. This research project took a fair degree of creativity as, by definition, the predicate conditions that I asked Julio to address do not actually exist. I was very impressed that Julio and his research partner on this project came up with eight different Constitutional provisions that could be implicated if federal labor law preemption was lifted and states took action to limit collective bargaining rights. This research is very useful for me in my own work probing this question.

I have also had the chance to talk with Julio about his fellowship with Senator Warren this summer. I had the privilege of working in the Senate for Senator Kennedy and so have some insight into the kind of skills necessary to succeed as a Senate staffer. I have every confidence that Julio will make a great contribution to Senator Warren's office. I'm looking forward to hearing about his adventures when he returns to Cambridge in the fall.

My observation about Julio that may be most relevant for you is what a joy it is to work with him. He is a thoroughly decent and compassionate person. I very much looked forward to our conversations about the law, current events and how to make HLS an even better place to be. He would be a very positive presence in your chambers, not only because of his legal acumen but also because of the quality of his character.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Sharon Block

Sharon Block - sblock@law.harvard.edu - 617-495-9265

RUTGERS Law School

Rutgers University-Newark
S.I. Newhouse Center for Law and Justice
123 Washington Street, Room 193A
Newark, New Jersey 07102-3026

http://law.rutgers.edu

DAVID LOPEZ
Professor of Law and Professor Alfred Slocum Scholar

Tel: 973-353-0643
david.lopez@law.rutgers.edu

May 24, 2023,

Dear Honorable Judge,

I am writing to strongly recommend Julio Colby for a clerkship in your chambers.

I am a University Professor at Rutgers Law School-Newark campus, where I served as the Dean on that campus from 2018-2021. I have taught at several law schools, including – as I will discuss – Harvard, as well as NYU and Georgetown. In total I have taught hundreds of law students. Prior to entering academia, I served as the General Counsel of the Equal Employment Opportunity, twice appointed by President Barack Obama and confirmed by the U.S. Senate, where I also supervised and mentored dozens of law students. For the reasons I will discuss below, I regard Mr. Colby as one of the top one-percent of the students I have taught, mentored, and/or supervised during my career.

Following my service as Dean in July 2021, I spent the spring semester of my one-year sabbatical at Harvard Law School where I served as a Visiting Professor. It is in this capacity where I had the pleasure of first meeting Mr. Colby when he served as one of my research assistants examining the labor safeguards of the recently-adopted United States Mexico Canada Free Trade Agreement.

Given his outstanding work, I was pleased to have Mr. Colby enrolled this semester as a student in a seminar entitled "Law and the Legal System through the Lens of Latinx/a/o Communities," where he received a "high pass," the highest grade available. As part of the seminar, Mr. Colby wrote an outstanding paper critically analyzing and deconstructing the federal H-2A worker program and making strong recommendations for reform. One original and powerful quality of the paper is how Mr. Colby interspersed the doctrinal analysis with narratives of interviews he conducted with predominately Mexican national agricultural workers as part of an earlier summer internship.

In addition, as part of a seminar centered on class engagement, Mr. Colby participated frequently in the class always offering insightful comments and written reflections. During these discussions, I was always impressed by the high esteem he was afforded by his peers. Further, Mr. Colby engaged well with the inter-disciplinary materials and approach of the seminar but, more than his peers, always drilled down on some of the thorny doctrinal questions embedded in the broader discussion, analyzing legal materials from many

perspectives as both a deep and creative thinker. Given this clear love of the law and justice, I was not surprised to learn Mr. Colby also serves as an editor of the Harvard Law Review.

One other personal note. Mr. Colby devoted last summer to working on immigrant worker issues with Southern Migrant Legal Services in Nashville, and this summer will be working on labor issues with Senator Elizabeth Warren. As someone who also attended Harvard from a state university, I appreciate the enormous resilience and commitment Mr. Colby has demonstrated to navigate a new and elite space, achieve academic excellence, and remain both humble and focused on providing voice and representation for those too often denied adequate legal services and justice. Needless to say, I am very eager to see what remarkable things he will accomplish in his legal career.

In sum, based on these tremendous characteristics, I have no doubt that Mr. Colby will be a productive, collegial, and valued member of your chambers, and continue to make meaningful and positive contributions to the legal profession, as well as further broader values of access to justice. I am also certain, Mr. Colby will "pay forward" any clerkship opportunity by opening doors to others.

Please reach out if you have any questions. You may contact me at (862) 301-8898.

Sincerely,

David Lopez

July 05, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write on behalf of Julio Colby, a rising third-year student at Harvard Law School, who has applied for a clerkship in your chambers. I recommend Mr. Colby highly. He has been a student in two of my courses, and he is a contributor to the blog I edit. In each of these settings, Mr. Colby has performed extremely well. He also has an impressive commitment to using law in the service of the public. I have no doubt that Mr. Colby will make an outstanding law clerk.

I first met Mr. Colby when he was a student in my 1L reading group, The Struggle for Workers' Rights on Film. This course is a relatively informal small-group class taught in the early months of a student's time at the law school. My course uses a series of movies to explore basic themes in labor movement history and labor law. Mr. Colby stood out in the course for his ability to offer insightful comments about the themes of the movies we were discussing while also bringing to bear his personal and political commitments in a productive way. Mr. Colby's manner of intervention was also notable: he speaks respectfully, thoughtfully, while also making strong arguments that routinely persuaded his classmates.

During the Spring 2022 semester, Mr. Colby was a student in my Labor Law class. Labor Law is a large, black-letter law class taught in the Socratic style. When Mr. Colby took Labor Law there were approximately 90 students in the class, and Mr. Colby was among the strongest. His exam was excellent, earning him an H grade for the course. On each of the exams' three questions, Mr. Colby displayed a strong command of the doctrinal material in the course as well as the more theoretical material. Mr. Colby also was an important contributor to class discussions throughout the semester. He was completely prepared for every class session and answered all the questions I put to him with depth and accuracy. I remember in particular his answers to my questions about American National Insurance Company, a case regarding management functions clauses.

Based on Mr. Colby's performance in my courses, I have asked him to work as a student contributor for OnLabor.org, a labor law blog that I edit. As a contributor, Mr. Colby writes the News & Commentary feature approximately once every two weeks, a task that involves consolidating large amounts of material into short pieces of writing that are clear, accurate and accessible. Doing this work successfully requires both clarity of thinking and strong writing skills –both which Mr. Colby possesses. Mr. Colby's posts are uniformly accurate and extremely well written. He is an exemplary contributor to the blog.

I also have had the privilege of supervising Mr. Colby's "Recent Thing" for the Harvard Law Review, which he wrote on California's new sectoral labor law, the FAST Act. The questions raised by the FAST Act, including whether and why the legislation is preempted by federal labor law, are both complicated and of the utmost importance. Mr. Colby's piece represents one of the first sustained legal treatments of these questions, and it is a model of clarity and persuasive argument.

Finally, I have had the opportunity to get to know Mr. Colby through his service as a student fellow for the Law and Social Change Program of Study (of which I am faculty director). In this capacity, Mr. Colby has taken responsibility for organizing a number of student events designed to encourage interested participants to pursue careers in social change work. He is terrifically well-organized, hard-working and an excellent leader among his peers. Mr. Colby is a pleasure to know and work with. He combines all of this intellectual talent with a humility that can be all too rare among law students. This combination of traits will make Mr. Colby a successful lawyer and a marvelous colleague. I have no doubt that they will also make him a terrific law clerk and a welcome addition to any chambers.

Thank you for your attention to Mr. Colby's application. I would be happy to discuss it further.

Sincerely,

Benjamin Sachs

Benjamin Sachs - bsachs@law.harvard.edu - 617-384-5984

JULIO QUIROZ COLBY
3 Linnaean St. #2 • Cambridge, MA 02138 • (281) 389-0659 • jcolby@jd24.law.harvard.edu

WRITING SAMPLE

Drafted Fall 2022–Spring 2023

The attached is the print version of my Comment published in the April 2023 issue of the *Harvard Law Review* arguing that the Fast Food Accountability and Standards Recovery Act, a California law that creates a council to set minimum employment standards for the fast-food industry, is not preempted by the National Labor Relations Act and should serve as a model for local labor legislation.

RECENT LEGISLATION

LABOR LAW — NLRA PREEMPTION — CALIFORNIA LAW CREATES COUNCIL TO SET MINIMUM WORK STANDARDS FOR FAST-FOOD INDUSTRY. — CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023) (effective Jan. 1, 2023).

In 2012, two hundred fast-food workers in New York City walked out of their jobs demanding $15 an hour and a union.[1] Since then, the "Fight for $15" campaign has spread to become a global movement demanding (and winning) wage increases for low-income workers in cities across the country.[2] Faced with a "weak" and "rigid" federal labor statute[3] in the National Labor Relations Act[4] (NLRA) and the challenges of organizing a transient workforce[5] in a "fissured" workplace,[6] the movement has turned to state employment law to protect workers.[7] Recently, in California, the Fight for $15 movement achieved its latest victory — the Fast Food Accountability and Standards Recovery Act[8] (FAST Act), which creates a Fast Food Council of state-appointed employer, employee, and government representatives to set minimum wages and employment standards for the fast-food industry.[9] The Act is a bold attempt at participatory democracy, but its design opens it up to preemption-based challenges. Far from being preempted, however, the FAST Act should serve as a model for local legislation to protect workers' rights.

AB 257 was originally introduced by Assemblymember Lorena Gonzalez in January 2021 but failed on the Assembly floor by three

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[1] *See About Us*, FIGHT FOR $15, https://fightfor15.org/about-us [https://perma.cc/QU63-W65Z].

[2] *See id.*; Dominic Rushe, *"Hopefully It Makes History": Fight for $15 Closes in on Mighty Win for US Workers*, THE GUARDIAN (Feb. 13, 2021, 5:00 AM), https://www.theguardian.com/us-news/2021/feb/13/fight-for-15-minimum-wage-workers-labor-rights [https://perma.cc/BV62-35P3]; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 51 (2016).

[3] Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2686 (2008) ("[M]ost scholars believe that the NLRA is a failed regime." *Id.* at 2685–86.).

[4] 29 U.S.C. §§ 151–169.

[5] Lela Nargi, *An Inside Look at Union Organizing in the Fast Food Industry*, CIV. EATS (Dec. 7, 2021), https://civileats.com/2021/12/07/an-inside-look-at-union-organizing-in-the-fast-food-industry [https://perma.cc/PX4D-VQLN].

[6] Andrias, *supra* note 2, at 61. Even if unionizing is successful, since many fast-food workers work at franchises, joint-employment rules make it next to impossible to bring fast-food companies to the bargaining table. *See* Eric Morath, *Labor Rule Impedes Fast-Food, Contract Workers' Ability to Unionize*, WALL ST. J. (Feb. 25, 2020, 12:15 PM), https://www.wsj.com/articles/labor-rule-impedes-fast-food-contract-workers-ability-to-unionize-11582638300 [https://perma.cc/5629-EF6Q].

[7] Of the more than eight-and-a-half million food-service workers in the United States, only 1.7% are represented by unions, the lowest rate of any industry in the country. Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 19, 2023), https://www.bls.gov/news.release/union2.t03.htm [https://perma.cc/TRH9-KEFC].

[8] Assemb. B. 257, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted) (codified at CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023)).

[9] LAB. § 1471(b).

votes in June 2021.[10] An amended version of the bill was reintroduced in January 2022, and, after further amendments, the bill passed by a bare majority in the Senate.[11] After passing the Assembly, the bill was signed into law by Governor Gavin Newsom on September 5, 2022.[12] The Act is the result of collective action by fast-food workers across California who filed hundreds of health, safety, and wage complaints during the COVID-19 pandemic and went on strike to demand better conditions and passage of the bill.[13] The legislative findings describe the "abuse, low pay, few benefits, and minimal job security" of fast-food workers; the prevalence of "wage theft, sexual harassment and discrimination"; and the industry's "heightened health and safety risks,"[14] which were exacerbated by the pandemic.[15] Accordingly, the purposes of the Council are "to establish sectorwide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of, and to supply the necessary cost of proper living to, fast food restaurant workers," as well as to coordinate state agency responses to those issues.[16]

The Council is composed of ten members: one representative each of the Department of Industrial Relations and the Governor's Office of Business and Economic Development, two of fast-food franchisors, two of franchisees, two of employees, and two of advocates for employees.[17]

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[10] *Bill Votes, AB-257 Food Facilities and Employment*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220AB257 [https://perma.cc/HY6X-TXDD] (to see information about the bill as originally introduced, select "01/15/21 - Introduced" from the "Version" dropdown menu at the top right of the page, then click the "Status" tab).

[11] *Id.* The amended version of the bill capped the minimum wage at $22, reduced the number of government representatives on the Council, and removed franchisor joint liability for labor law violations made by franchisees. Jaimie Ding & Suhauna Hussain, *California Legislature Passes Bill to Protect Fast-Food Workers*, L.A. TIMES (Aug. 29, 2022, 7:38 PM), https://www.latimes.com/business/story/2022-08-29/california-senate-pass-bill-fast-food-workers [https://perma.cc/YF2R-Y7R2].

[12] Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Legislation to Improve Working Conditions and Wages for Fast-Food Workers (Sept. 5, 2022), https://www.gov.ca.gov/2022/09/05/governor-newsom-signs-legislation-to-improve-working-conditions-and-wages-for-fast-food-workers [https://perma.cc/TX8P-DVXJ].

[13] Press Release, Fight for $15, On Labor Day, Gov. Newsom Signs Landmark Bill to Give Voice to More than Half Million Fast-Food Workers (Sept. 5, 2022), https://fightfor15.org/on-labor-day-gov-newsom-signs-landmark-bill-to-give-voice-to-more-than-half-million-fast-food-workers [https://perma.cc/5X4C-GD4L].

[14] Assemb. B. 257 § 2(a), 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted).

[15] "Numerous complaints" filed by workers showed employers "routinely . . . flouted protections." *Id.* § 2(f). The legislature found the health and safety risks to workers and the public "serious and unacceptable," *id.* § 2(g), and noted that companies "profited during the pandemic" while their workers remained unable to participate in a "more equitable economy," *id.* § 2(h).

[16] CAL. LAB. CODE § 1471(b) (West Supp. 2023). In addition to wages and workplace safety, working conditions also include "the right to take time off work for protected purposes, and the right to be free from discrimination and harassment in the workplace." *Id.* § 1470(h). The Council cannot set standards for paid time off or predictable scheduling but may make a recommendation to the legislature to enact laws regarding the former. *Id.* § 1471(d)(2)(B)(7)–(8).

[17] *Id.* § 1471(a)(1). The Speaker of the Assembly and the Senate Rules Committee each appoint one representative of employee advocates; the Governor appoints all other members. *Id.* § 1471(a)(2).

Its standards cover all workers employed by a restaurant that is part of a fast-food chain, meaning it has one hundred or more establishments nationwide that share a common brand or standardized services.[18] The Council may set a minimum wage as high as $22 in 2023, with that cap increasing at a set rate each year.[19] The Council must conduct a full review of minimum standards at least once every three years,[20] and it must hold public meetings no less than once every six months in metropolitan areas across the state where fast-food workers and the public will have the opportunity to be heard on issues of industry conditions.[21]

Once the Director of Industrial Relations receives "a petition approving the creation of the council signed by at least 10,000 California fast food restaurant employees,"[22] the Council shall promulgate these minimum standards, decided by majority vote, and submit them to the labor committees of the legislature by January 15.[23] The standards take effect October 15 of that year at the earliest, but the legislature may pass legislation to prevent them from going into effect.[24] The Council is empowered to direct and coordinate with the Governor and government agencies,[25] and where its standards conflict with any existing regulations, the Council's standards apply.[26] The Act makes an exception for standards in collective bargaining agreements that provide better protection than a conflicting Council-promulgated standard.[27] Failure to abide by these standards is unlawful, and compliance is enforced by the Labor Commissioner and Division of Labor Standards Enforcement pursuant to their enforcement procedures as well as any which the Council may promulgate.[28] The Council will cease operations

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18 *Id.* § 1470(a).

19 *Id.* § 1471(d)(2)(B).

20 *Id.* § 1471(f). The Council is constrained by a one-way ratchet: any new regulation cannot be less protective or beneficial than the one it replaces. *Id.*

21 *Id.* § 1471(g). In cities or counties of more than 200,000 people, the Act allows for the establishment of "Local Fast Food Councils" — composed of at least one fast-food franchisor or franchisee, one fast-food worker, and a majority of representatives from relevant local agencies — which also host public meetings and may provide the Council with recommendations. *Id.* § 1471(i).

22 *Id.* § 1471(c)(2).

23 *Id.* § 1471(d)(1)(A)–(B).

24 *Id.* § 1471(d)(1)(B).

25 *Id.* § 1471(c)(1).

26 *Id.* § 1471(d)(1)(A). Where contemplated standards fall within the jurisdiction of the Occupational Safety and Health Standards Board, however, the Council is not authorized to promulgate those standards but shall petition the Board to adopt them. *Id.* § 1471(e). The Board must respond within six months, or three months in an emergency. *Id.*

27 *Id.* § 1471(k)(3). The collective bargaining agreement's standard applies so long as the agreement provides "a regular hourly rate of pay not less than 30 percent more than the state minimum wage for those employees, . . . [it] provides equivalent or greater protection than the standards established by the council," and state law on the issue authorizes such an exception. *Id.*

28 *Id.* § 1471(k)(1). The Commissioner can investigate an alleged violation, order temporary relief by issuing a citation, and initiate a civil action for which a court may grant injunctive relief. *Id.* § 1471(k)(2). The Act also protects workers from employer retaliation for whistleblowing, testifying before any council, or refusing to work based on a serious safety concern, providing the worker with a right of action and entitling them to reinstatement and treble damages. *Id.* § 1472(a)–(b).

on January 1, 2029.[29]

The FAST Act is an important attempt to create a participatory legislative structure to protect workers within the NLRA regime. Where federal labor law has failed an entire industry, California has stepped in to create a political structure that is responsive to workers' needs. In many ways, this approach is nothing new: state legislatures, including the California Assembly, often delegate quasi-legislative authority to expert boards;[30] and wage councils proliferated in the Progressive and New Deal Eras.[31] But one likely challenge to the Act is rooted in an unlikely source: the NLRA itself. While the NLRA grants workers the affirmative right to unionize and bargain collectively, it also preempts any state and local legislation attempting to regulate the same.[32] But any preemption challenges to the Act should fail. State minimum labor standards are not preempted by the NLRA, and the Council's structure does not displace the NLRA's private collective bargaining regime. Instead, states and municipalities should look to the FAST Act's structure as an effective way to protect workers through employment legislation, especially in industries where unionizing is untenable.

Though nothing in the NLRA expressly states that it preempts state legislation, a series of Supreme Court decisions has elaborated a broad implicit preemption regime that rivals that of most other federal statutes.[33] In its landmark 1959 decision *San Diego Building Trades Council v. Garmon*,[34] the Court held that if an activity is "arguably" protected or prohibited by the NLRA, states do not have jurisdiction to regulate that activity because allowing them to do so "involves too great a danger of conflict with national labor policy."[35] The Court elaborated a separate and even more expansive preemption regime in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*,[36] holding that an activity can be "protected"[37] under the NLRA where Congress intended it to be left unregulated as a "permissible 'economic

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[29] *Id.* § 1471(m). If the Council is inoperative on that date, the minimum wage for fast-food workers will continue to increase annually at a set rate. *Id.* § 1473.

[30] Catherine L. Fisk & Amy W. Reavis, *Protecting Franchisees and Workers in Fast Food Work*, AM. CONST. SOC'Y (Dec. 2021), https://www.acslaw.org/wp-content/uploads/2021/12/Fisk-Reavis-IB-Final5662.pdf [https://perma.cc/4NXM-QLTE].

[31] *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 650–53 (2019) ("By 1938, twenty-five states had some form of minimum wage law. . . . [N]early all of these early wage-and-hour statutes used some form of industry committee . . . ." *Id.* at 652.); *id.* at 667–69 (describing the Fair Labor Standards Act's tripartite industry committees that set wages by industry).

[32] Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154–55 (2011).

[33] *See id.* at 1154.

[34] 359 U.S. 236 (1959).

[35] *Id.* at 245–46.

[36] 427 U.S. 132 (1976).

[37] *Id.* at 141 (quoting NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 492 (1960)).

weapon[]'" wielded by parties in the collective bargaining process.[38] In addition to "arguably" protected activities, activities intended to be "controlled by the free play of economic forces" are also preempted.[39] Any local attempt to regulate those activities enters into the "substantive aspects of the bargaining process" and is thus preempted.[40] Under *Machinists*, the "crucial inquiry" is whether the local regulation at issue "would frustrate effective implementation of the Act's processes."[41] However, because "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms" reached through that process,[42] "state laws of general application" that set minimum standards of employment — like the FAST Act — are not preempted so long as they do not interfere with the NLRA's collective bargaining process.[43]

But the FAST Act's ambitious design could face an equally ambitious challenge under *Machinists*. The argument might go something like this: by creating a forum for labor and management to negotiate binding employment standards, the Act replaces the NLRA's collective bargaining regime with its own alternative bargaining process to effectively define all "the substantive aspects of the bargaining process" for the fast-food industry.[44] With employer and employee representatives deciding on comprehensive industry standards, the Act's challengers will argue that the Council does not simply "form a 'backdrop'" against which fast-food "employers and employees come to the bargaining table."[45] Rather, they will argue, it forms the bargaining table itself.[46]

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[38] *Id.* (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 489).

[39] *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)); *see also id.* at 150.

[40] *Id.* at 149–51 (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 498).

[41] *Id.* at 147–48 (quoting Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

[42] Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985); *see also id.* at 754.

[43] *See id.* at 753–54 ("The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment." *Id.* at 754.).

[44] *Machinists*, 427 U.S. at 149 (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 498).

[45] Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (quoting *Metro. Life*, 471 U.S. at 757).

[46] Indeed, fast-food-industry attorneys are already suggesting these arguments as potential challenges to the Act. *See, e.g.*, Riley Lagesen et al., *How the NLRA May Slow Down the FAST Act*, GREENBERG TRAURIG LLP (Oct. 14, 2022), https://www.gtlaw.com/en/insights/2022/10/published-articles/how-the-nlra-may-slow-down-the-fast-act [https://perma.cc/Q6MX-BHK4] ("By requiring another form of collective bargaining, the FAST Act may face challenges arguing that it interferes with or is preempted by federal law under the National Labor Relations Act."). And because the bargaining table is such a familiar labor paradigm, even the Act's proponents have used that language when referring to the Council. Service Employees International Union president Mary Kay Henry told Bloomberg News that "the bill effectively offers 'another form of collective bargaining' for fast food workers." Josh Eidelson, *California Moves to Give Fast Food Workers More Power, Heeding "Fight for $15*," BLOOMBERG NEWS (Aug. 29, 2022, 6:12 PM), https://www.bloomberg.com/news/articles/2022-08-29/california-moves-to-give-fast-food-workers-say-in-regulations [https://perma.cc/ENV7-ZLHA]. Union leaders might be forgiven for using collective bargaining language more abstractly to describe how the Act amplifies workers' political voices in setting employment standards, but the phrase is legally inapt.

Situating this atmospheric argument within the governing doctrine, two distinct preemption challenges emerge, both of which prove unavailing. The first is to the Act's substantive standards. Challengers are likely to argue that the Council's broad mandate to set industry-specific standards effectively defines the terms of fast-food employment contracts and thus interferes with the collective bargaining process. This idea has not been directly addressed by the Supreme Court, but it has received attention from the Ninth Circuit, whose precedent would likely control any challenge to the Act. In *Chamber of Commerce of the United States v. Bragdon*,[47] the Ninth Circuit found that the NLRA preempted a Costa County ordinance requiring employers in certain private industrial construction projects to pay a prevailing wage set by reference to industry collective bargaining agreements.[48] The panel based its holding on the fact that the ordinance applied only to "particular workers in a particular industry and [was] developed and revised from the bargaining of others."[49] In dicta, it went further, stating that "in the extreme, the substantive requirements could be so restrictive as to virtually dictate the results of the contract," thus interfering with the "free-play of economic forces" in the bargaining process.[50] In subsequent decisions, however, the Ninth Circuit has "made a significant retreat" from *Bragdon*, "effectively revers[ing]" its holding with respect to single industry standards[51] and limiting its application to "extreme situations."[52]

Even applying *Bragdon*'s dicta, nothing about the Act is "extreme." In *Bragdon*, the law at issue set a prevailing wage based on other collective bargaining agreements, forcing the employer to pay that wage rate whether it entered into an agreement or not — effectively "eviscerat[ing] the purpose of collective bargaining negotiations."[53] In contrast, the Council can set only a traditional minimum wage, capped by numbers hardcoded into the Act by the legislature.[54] The Council's

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[47] 64 F.3d 497 (9th Cir. 1995).

[48] *Id.* at 498–99, 504.

[49] *Id.* at 504.

[50] *Id.* at 501 (quoting Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 140 (1976)).

[51] Fortuna Enters., L.P. v. City of Los Angeles, 673 F. Supp. 2d 1000, 1010–11 (C.D. Cal. 2008) (citing Associated Builders & Contractors of S. Cal., Inc. v. Nunn, 356 F.3d 979, 990 (9th Cir. 2004)); *see Nunn*, 356 F.3d at 990 (citing Dillingham Constr. N.A., Inc. v. County of Sonoma, 190 F.3d 1034, 1034 (9th Cir. 1999); Nat'l. Broad. Co. v. Bradshaw, 70 F.3d 69, 71–73 (9th Cir. 1995); Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996)) ("It is now clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.").

[52] *Nunn*, 356 F.3d at 990.

[53] *Fortuna Enters.*, 673 F. Supp. 2d at 1009 (discussing *Bragdon*, 64 F.3d at 502–04).

[54] *See* CAL. LAB. CODE § 1471(d)(2)(B) (West Supp. 2023); *see also Bragdon*, 64 F.3d at 502 (finding ordinance preempted because its "specific minimum wage and benefits" for "specific construction projects" derived from collective bargaining agreements "affect[] the bargaining process in a much more invasive and detailed fashion" than "a minimum wage law, applicable to all employees, guarantying a minimum hourly rate.").

ability to set other minimum employment standards is constrained as well: the Act expressly prohibits regulation of paid time off or work scheduling, and the Council's mandate is limited to "wages, working hours, and other working conditions *adequate to ensure and maintain the health, safety, and welfare* of . . . fast food restaurant workers."[55] The Council's standards do not intrude into private collective bargaining at all — in fact, the Act explicitly provides an *exception* for collective bargaining agreements.[56] Moreover, other courts have upheld far more "extreme" regulations like for-cause protection,[57] including at the industry level,[58] most recently for fast-food workers in New York City.[59] Like any minimum standards, the Council's regulations simply set a backdrop for, but do not "dictate the results of,"[60] collective bargaining.

The second preemption challenge concerns the Council's structure. To start, the Supreme Court in *Chamber of Commerce of the United States v. Brown*[61] stated that "[i]n NLRA pre-emption cases, 'judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'"[62] Because states can set minimum employment standards, it should be irrelevant whether those standards are set through legislation, a wage board, or a fast-food council.[63] In the eyes of its challengers, however, the FAST Act creates a separate forum for sector-wide bargaining, infringing not only on a single economic weapon but on the entirety of "economic forces" of the collective bargaining regime.[64]

But that argument falls flat. The Council's structure is not novel: the Progressive Era saw over a dozen states establish commissions to set industry wages and standards, including California's own Industrial Welfare Commission (IWC), a tripartite board consisting of employer, worker, and state representatives.[65] In 2015, Fight for $15 pressured New York State into creating a tripartite wage board that raised the

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[55] LAB. § 1471(b) (emphasis added).

[56] *Id.* § 1471(k)(3); *see* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987) ("If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, surely one that permits such bargaining cannot be pre-empted." (citation omitted)).

[57] *See, e.g.*, St. Thomas–St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands, 218 F.3d 232, 246 (3d Cir. 2000).

[58] *See* R.I. Hosp. Ass'n v. City of Providence *ex rel.* Lombardi, 667 F.3d 17, 33 (1st Cir. 2011).

[59] Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366, 372–74 (S.D.N.Y. 2022).

[60] Chamber of Com. of the U.S. v. Bragdon, 64 F.3d 497, 501 (9th Cir. 1995).

[61] 554 U.S. 60 (2008).

[62] *Id.* at 69 (quoting Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 n.5 (1986)).

[63] *Cf. id.* ("California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.").

[64] *See* Andrias, *supra* note 2, at 91; Lagesen et al., *supra* note 46.

[65] Nelson Lichtenstein, *Sectoral Bargaining in the United States: Historical Roots of a Twenty-First Century Renewal*, *in* THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 87, 88–90 (Angela B. Cornell & Mark Barenberg eds., 2022). The IWC is "currently inoperative." *Id.* at 90.

minimum wage to $15 for fast-food workers.[66] Like these boards, the Council is a creature of old-fashioned political, not workplace, democracy. Employer and employee representatives are chosen by elected officials, and where there is any disagreement, government representatives have tiebreaking votes.[67] The legislature retains full control over whether these standards become law and can pass legislation to prevent them from taking effect. Moreover, there is no "bargaining" at all: there are no "economic weapons" to be wielded in a two-sided adversarial battle, only multi-party political deliberations. The table is round, not square. Though it may expand democratic participation, the Act does not provide an alternative avenue for workplace organization, self-determination, or collective bargaining, such that it might undermine those processes in the NLRA — the crucial inquiry in *Machinists*.

In both substance and form, the FAST Act sits squarely outside the bounds of NLRA preemption. When the NLRA established a regime of private collective bargaining, it did not mean to foreclose public policy as a recourse for workers to seek greater protection.[68] What is at stake here is greater than employment terms — it is how democracy itself can be leveraged to protect workers. Where "ossified" federal labor law provides no help in practically un-unionizable workplaces,[69] the FAST Act forms part of a growing trend of local legislation that expands workplace protections by involving workers in the political process.[70] The Act's fate will ultimately be decided by referendum vote after fast-food companies poured over $13 million into a signature-gathering campaign to place the law on the ballot in 2024.[71] Whatever the result, fast-food workers have made clear that they demand a change. Whether it's for a union, a living wage, or better working conditions, the fight continues.

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[66] Andrias, *supra* note 2, at 64–66.

[67] *See* CAL. LAB. CODE § 1471(a)(2) (West Supp. 2023); *see id.* § 1471(d)(1)(A) ("Decisions by the council . . . shall be made by an affirmative vote of at least six . . . members.").

[68] *See* Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 87 (2d Cir. 2015) ("*Machinists* preemption is not a license for courts to close political routes to workplace protections simply because those protections may also be the subject of collective bargaining." (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21–22 (1987))).

[69] *See generally* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

[70] Aurelia Glass & David Madland, *Worker Boards Across the Country Are Empowering Workers and Implementing Workforce Standards Across Industries*, CTR. FOR AM. PROGRESS (Feb. 18, 2022), https://www.americanprogress.org/article/worker-boards-across-the-country-are-empowering-workers-and-implementing-workforce-standards-across-industries [https://perma.cc/4CT2-BLTM] (discussing growth of tripartite boards in four states and three cities since 2018). These are examples of what Professor Kate Andrias has called "social bargaining," Andrias, *supra* note 2, at 8, and Professor Cynthia Estlund has called "sectoral co-regulation," Cynthia L. Estlund, Sectoral Solutions that Work: The Case for Sectoral Co-regulation 2–4 (Nov. 23, 2022) (unpublished manuscript) (on file with the Harvard Law School Library), a promising alternative model for building worker power in the new economy.

[71] Aneurin Canham-Clyne, *FAST Recovery Act Referendum Approved, Opening Political Duel in California*, REST. DIVE (Jan. 25, 2023), https://www.restaurantdive.com/news/fast-recovery-act-referendum-opens-political-duel-in-california/641196 [https://perma.cc/XGY6-VSAD].

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WRITING SAMPLE

Drafted Summer 2022

As a law clerk at Southern Migrant Legal Services, I prepared the attached memorandum for a retaliation case being brought by our employment team. Opposing counsel in the case claimed that our client would not be able to recover on any favorable judgment after the corporation dissolved, as was planned. This memorandum explored how claims can be brought and judgments enforced against a dissolving company under applicable state law.

To preserve confidentiality, all names and locations have been changed, although state names have been preserved. All the work in this memorandum is my own and it has not been edited or revised by my employer or anyone else. I received permission from my supervising attorney to use this memorandum as a writing sample.

To: Supervising Attorney

From: Julio Colby

Date: 7/28/2022

Re: Corporate Winding Up of Acme

This defendant in this case is Acme Inc. Acme is being sued for a workplace retaliation claim by our client, Jane Doe. Acme's counsel has verbally suggested that the corporation is in the process of "winding up" its business, and that when the process is complete, even if our client prevails on her claim there will be no money left to recover for damages. This memo will address the veracity of the opposing counsel's claims. Namely: if Acme dissolves its Texas business, can our client still recover damages on her claim?

Delaware law likely applies to Acme's corporate winding up procedures

Acme is a Delaware corporation, with its principal office in Holmes City, Maryland, and a branch operating in Ames County, Texas, where the events giving rise to this action occurred. Plaintiffs Original Petition at 2. In filings with the Texas Secretary of State, Acme is registered as a "Foreign For-Profit Corporation." This likely means it is a "foreign filing entity" under the Texas Business Organizations Code (the "Code"). A foreign filing entity is an "organization formed under, and the internal affairs of which are governed by, the laws of a jurisdiction other than this state," which "registers or is required to register as a foreign entity under Chapter 9 [of this code]." Tex. Bus. Orgs. Code Ann. § 1.002 (28)-(29) (Vernon).

The Code codifies the internal affairs doctrine, "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with

conflicting demands." *Hartman Income REIT, Inc. v. MacKenzie Blue Ridge Fund III, L.P.*, 01-20-00218-CV, 2022 WL 243992, at *2 (Tex. App.--Hous. [1st Dist.] Jan. 27, 2022), *withdrawn, Hartman Income Reit, Inc. v. MacKenzie Blue Ridge Fund III, LP.*, 01-20-00218-CV, 2022 WL 2124905 (Tex. App.--Hous. [1st Dist.] June 14, 2022) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)). Generally, a registered foreign filing entity "enjoys the same but no greater rights and privileges as the domestic entity to which it most closely corresponds." Tex. Bus. Orgs. Code Ann. § 9.202 (Vernon). "In any matter that affects the transaction of intrastate business," a foreign entity and any of its members is subject to the same "duties, restrictions, penalties, and liabilities imposed on a domestic entity to which it most closely corresponds in [the] state," *Id.* at § 9.203. However, "[i]f the formation of an entity occurs when a certificate of formation or similar instrument filed with a foreign governmental authority takes effect, the law of the state or other jurisdiction in which that foreign governmental authority is located governs the formation and internal affairs of the entity." *Id.* at § 1.104.

Accordingly, whether dissolution makes up part of a company's "internal affairs" in Texas will determine whether Texas or Delaware law applies to those procedures. Under the Code, "the internal affairs of an entity include: (1) the rights, powers, and duties of its governing authority, governing persons, officers, owners, and members; and (2) matters relating to its membership or ownership interests." Tex. Bus. Orgs. Code Ann. § 1.105 (Vernon). Chapter 11 of the Code and the procedures therein prescribed apply to the winding up of a *domestic* entity; the term "winding up" is defined as "process of winding up the business and affairs of a domestic entity." *Id.* at § 11.001(8). The termination of a foreign filing entity, on the other hand, is governed by Chapter 9 of the Code. That Chapter dictates that a foreign filing entity may be terminated in one of two ways: (1) by filing a "certificate of withdrawal"; or (2) "if the existence

or separate existence of a foreign filing entity or foreign limited liability partnership registered in this state terminates because of dissolution, termination, merger, conversion, or other circumstances, a certificate by an authorized governmental official of the entity's jurisdiction of formation that evidences the termination shall be filed with the secretary of state." *Id.* at § 9.011. Notably, while an unregistered foreign filing entity "may not maintain an action, suit, or proceeding" in the state of Texas that arises from transacting business in the state, the failure to register does not "prevent the entity from defending an action, suit, or proceeding in a court in this state." *Id.* at § 9.051 (b)-(c) (Vernon).

The legal capacity and duties of Acme, a foreign filing entity registered in the state of Texas, after termination likely form part of the company's "internal affairs," governed by the law of the state in which it was incorporated: Delaware. While there are no truly on-point cases, a couple are instructive. In *Anglo-Dutch Petroleum Intern., Inc. v. Case Funding Network, LP*, the Court of Appeals of Texas, Eastland found that two Nevada companies maintained the capacity to sue and be sued under Nevada law after they had their charters revoked by the state, such that they could still register to do business in Texas and maintain a lawsuit. 441 S.W.3d 612, 623 (Tex. App.--Hous. [1st Dist.] 2014). In *Lone Star Industries, Inc. v. Redwine*, the Fifth Circuit, applying Louisiana law, which also adheres to the internal affairs doctrine, determined (through an *Erie* guess) that the law of a company's state of incorporation should be applied to matters concerning its viability after dissolution. 757 F.2d 1544, 1548 n.3 (5th Cir. 1985); *accord Regal Ware, Inc. v. CFJ Mfg., L.P.*, 11-13-00044-CV, 2015 WL 1004380, at *2 (Tex. App.--Eastland Feb. 27, 2015) (finding Delaware law applies to the question of corporate survival and proceeding "as a federal court would under the *Erie* doctrine"). The court looked to winding up

procedures in the Delaware Code to determine that the corporation could appoint a trust to oversee its winding up. *Id.* at 1549.

In interpreting any ambiguous language in the Code, Texas courts seek to effect the intent of the Legislature by giving the words in the statute their common meaning, presuming that words not included were intentionally omitted, avoiding superfluity, and may also consider its general structure. *Hartman Income*, 01-20-00218-CV, 2022 WL 243992, at *4. Interpreting the Code under these principles supports the conclusion that winding up procedures form part of a company's internal affairs. First, the decision by governing officers to dissolve a corporation, the settling of obligations in that dissolution, and legal rights and duties maintained throughout that period and beyond seem to be squarely within the "the rights, powers, and duties of [a corporation's] governing authority, governing persons, officers, owners, and members." See *Hartman Income*, 01-20-00218-CV, 2022 WL 243992, at *6. ("[W]e conclude that a shareholder's demand to exercise a right of inspection is a 'right[ ] [or] power [of] ... [a] member' within the meaning of section 1.105, and it is therefore an internal affair.").

Moreover, if the winding up procedures described in Chapter 11, "winding up and termination of domestic entity" were meant to apply to foreign entities, the inclusion of the word *domestic* in its title and throughout the chapter would be superfluous. The lack of a separate chapter for winding up of a foreign filing entity and the omission of any procedures in Chapter 9, the section describing foreign filing entity termination, suggests those procedures were not meant to be governed by Texas law. The procedures for "voluntary withdrawal of registration" in that section are also revealing. A company may terminate its registration by: "withdraw[ing its] registration;" or if its "existence . . . terminates," then it must present "a certificate by an authorized governmental official of the entity's jurisdiction of formation that evidences the

termination." Tex. Bus. Orgs. Code Ann. § 9.011 (Vernon). Though a company may terminate its *registration* in the state of Texas, termination of the *company* refers to a company's dissolution in its state of incorporation.

Delaware law requires Acme to set aside funds for a pending action after dissolving

Delaware corporations are governed by the provisions of Title 8 of the Delaware Code. Del. Code Ann. tit. 8, § 121(b) (West). Subchapter X of that title includes the procedures for dissolving a company, as well as its viability and liability after dissolution. *See Id.* at §§ 275-282. When the board or shareholders of a company decide to dissolve it by majority vote, they must file with the Secretary of State a certificate of dissolution, which becomes effective and dissolves the company when filed. *Id.* at § 275. As a general matter, dissolved corporations continue for a term of 3 years to prosecute and defend suits, settle their business, dispose of property, discharge liabilities, and distribute assets.[1] *Id.* at § 278. Any action brought before or during that 3-year period "shall not abate" upon dissolution of the corporation, and the corporation will, for the purposes of that proceeding, be "continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed." *Id.* After a corporation is dissolved, it has two procedural options for handling existing and potential claims against it: "(1) the elective procedures in Sections 280 and 281(a); or (2) the default procedure under Section 281(b)." *In re Krafft-Murphy Co., Inc.*, 62 A.3d 94, 102 (Del. Ch. 2013), *rev'd on other grounds,* 82 A.3d 696 (Del. 2013).

[1] Additionally, upon petition by a creditor, stockholder, director, or any other person showing "good cause," the Court of Chancery may appoint a director to be a trustee or a person to be a receiver for the corporation, "to take charge of the corporation's property, . . . collect the debts and property due and belonging to the corporation," and prosecute and defend suits "necessary or proper" for the above purposes. Del. Code Ann. tit. 8, § 279. The trust or receivership "may be continued as long as the Court of Chancery shall think necessary" for those purposes. *Id.*

A corporation that opts for the "default procedure" must adopt a "plan of distribution," to which the dissolved corporation "shall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the corporation which is the subject of a pending action, suit or proceeding to which the corporation is a party." Del. Code Ann. tit. 8, § 281(b)(ii) (West). The plan must provide that those claims "shall be paid in full and any such provision for payment made shall be made in full if there are sufficient assets." *Id.* at § 281(b). In the case of insufficient assets, "claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of assets legally available therefor." *Id.* This section instructs that "priority" does *not* refer to "the relative times at which any claims mature or are reduced to judgment," *Id.* at § 281(e), meaning that a corporation with insufficient funds to "make adequate provision for contingent and future claims . . . is directed not to pay its current creditors in full but to pay them ratably." *In re RegO Co.*, 623 A.2d 92, 106 (Del. Ch. 1992).

If a corporation follows this path, claimants may "challenge the plan of dissolution and seek to enjoin any distributions that it contemplates, . . . attempt to recover from the directors personally on the theory that the directors failed to comply with the statute," or "claw back" distributed payments to stockholders. *In re Altaba, Inc.*, 264 A.3d 1138, 1157-8 (Del. Ch. Oct. 8, 2021). Although compliance with these procedures absolves directors of personal liability to claims against the dissolved corporation, Del. Code Ann. tit. 8, § 281(c) (West), "[c]ompliance with the statutory standards under the Default Path 'will, in principle at least, always be litigable.'" *Altaba*, 264 A.3d 1138, 1157 (quoting *RegO*, 623 A.2d 92, 97).

On the other hand, if a corporation chooses to follow the "elective procedures," it can "obtain binding judicial determinations" of the appropriate amounts required to be set aside for

claims, allowing "the question of sufficiency [to] be litigated up front." *Altaba*, 264 A.3d 1138, 1157. Under those procedures: a corporation must provide notice to "all persons having claims against the corporation other than claims already in litigation;" claimants must present their claims within a given period; a corporation can accept or reject those claims; and claimants must object to security offers or commence an action on a rejected claim within a certain period of time or that claim is lost. *Id.* at 1158; *see* Del. Code Ann. tit. 8, § 280. The corporation must then petition the Court of Chancery for the appropriate amount of security for any rejected offers, unknown claims likely to arise, and pending actions. *Id.* at § 280(c). For pending actions, the petition is for "the amount and form of security that will be reasonably likely to be sufficient to provide compensation for any claim against the corporation which is the subject of a pending action, suit or proceeding to which the corporation is a party." *Id.* at § 280(c)(1). The petitioning company has the burden of "establish[ing] the amounts and forms of security that will satisfy the statutory tests." *Matter of Glob. Safety Labs, Inc.*, 275 A.3d 1278, 1283 (Del. Ch. 2022). Only after a corporation completes these steps, including paying of claims and the required security, will remaining assets "be distributed to the stockholders of the dissolved corporation." *Id.* (quoting Del. Code Ann. tit. 8, § 281(a)).

Whether a corporation chooses the elective or default winding up procedures, compliance with either path ends in the same result: "shield[ing] directors and shareholders of the dissolved corporation from post-dissolution liability to third party claimants." *Altaba*, 264 A.3d 1138, 1157 (quoting *Krafft-Murphy*, 82 A.3d 696, 706 (Del. Ch. 2013)). As mentioned above, a company's compliance with the self-managed default procedures, rather than the court-managed elective path, is open to legal challenge,[2] presenting a "risky situation for corporate directors." *RegO*, 623

[2] A note regarding jurisdiction: Section 283 gives the Court of Chancery jurisdiction "of any application prescribed in this subchapter and of all questions arising in the proceedings thereon." Del. Code Ann. tit. 8, § 283 (West). Any

A.2d 92, 97 (Del. Ch. 1992). Even after complying with these procedures, stockholders of a dissolved corporation who received distributed assets are still liable for any "claim against the corporation" up to "such stockholder's pro rata share of the claim or the amount so distributed to such stockholder, whichever is less." Del. Code Ann. tit. 8, § 282(a) (West). The limitations on liability for "claims against the corporation" in this section, however, would not protect stockholders from liability for any fraudulent transfers by a company seeking to avoid paying out claims. *See RegO*, 623 A.2d 92, 104 (Del. Ch. 1992) ("Section 282 is not intended to limit the ability of a court to recover . . . funds fraudulently conveyed to a corporation's stockholders prior to dissolution, the transfer of which left the corporation insolvent.").

Acme's winding up does not prevent Ms. Doe from recovering on her claims

On the question of Acme's liability after its dissolution, Texas law points us to Delaware law, which follows common sense—the decision to dissolve a corporation does not magically absolve it of liability for pending actions. In fact, Delaware law goes further by not only asking a corporation to set aside sufficient funds for pending claims, but also for *future* claims which it anticipates are likely to arise. A dissolving company gets a choice: have the Court of Chancery settle its claims up front and limit future liability through the elective path; or follow the default procedures to settle the claims itself, leaving open the question of whether it properly complied with statutory requirements. If the company chooses the latter, it may not discriminate by paying off current claims before future or pending ones, rather, it must do so ratably. Failure to comply with these requirements, or any attempt to circumvent them by fraudulently conveying funds to

judgment by that court against the corporation for improper compliance with statutory winding up procedures should be recognized by other state courts because "the law governing corporate dissolution [is] entitled to Full Faith and Credit in those sister-state jurisdictions in which execution of a judgment against a dissolved corporation was sought." *RegO*, 623 A.2d 92, 106 n.32 (Del. Ch. 1992). Meanwhile, Texas state courts considering these matters should apply Delaware law as a federal court would under *Erie*. *See Regal Ware*, 11-13-00044-CV, 2015 WL 1004380 at *2.

shareholders before dissolution, allows an affected claimant to directly sue the directors or stockholders to recover owed funds.

Delaware law gives Acme the right to dissolve itself if its board so chooses. But it also requires that our Ms. Doe's claims be properly accounted for. If Acme and its counsel fail to comply with laws meant to reduce its liability, then they can face the consequences in court.

Applicant Details

First Name	**Leighton Fernando**
Last Name	**Cook**
Citizenship Status	**U. S. Citizen**
Email Address	**leighton.cook@yale.edu**
Address	**Address** **Street** **80 Howe St Apt. 608** **City** **New Haven** **State/Territory** **Connecticut** **Zip** **06511** **Country** **United States**
Contact Phone Number	**2174806091**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2018**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Yale Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Thomas Swan Barristers' Union Mock Trial Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hathaway, Oona
oona.hathaway@yale.edu
203-436-8969
Muneer, Ahmad
muneer.ahmad@yale.edu
_203_ 432-4716
Gohara, Miriam
miriam.gohara@yale.edu

References

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Formerly of the Public Defender Services for the District of Columbia
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Supervisor in the immigration unit during the summer of 2022

Jeremy Jong
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Staff Attorney
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(504) 475-6728
Supervisor for my externship during the fall semester of 2022

Susan W. McGrath
Champaign County Circuit Clerk
101 E. Main St.
Urbana, IL 61801
smcgrath@co.champaign.il.us
(217) 384-3725
Supervisor from June 2020 to August 2021
This applicant has certified that all data entered in this profile and any application documents are true and correct.

80 Howe St., Apt. 608
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June 23, 2023

Hon. Stephanie D. Davis
U.S. Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, Michigan 48226

Dear Judge Davis,

I am writing to apply for a clerkship in your chambers following my graduation from Yale Law School in 2024 or any term thereafter. I am particularly interested in applying to your chambers because of your dedication to public interest law.

My personal and professional experiences have led me to a clerkship and I believe I would serve your chambers well. I grew up in a low-income immigrant family, and the struggles we faced motivated me to pursue a legal career to help the disadvantaged. After university graduation, I worked for the Champaign County Circuit Clerk's office where I saw firsthand the difficulties that underprivileged, and especially non-English speaking, individuals face when navigating the legal system. While I assisted them to the best of my ability, I decided to become a lawyer to more directly help individuals in a similar position. These experiences would be particularly beneficial for this position because they have helped me to see the court system through a different lens and to recognize the positionalities of litigants of all backgrounds. Finally, I am applying for this clerkship to continue honing my research and writing skills under your leadership so that I can become a more effective future public interest lawyer and better work towards realizing equal justice for all.

My resume, transcript, writing sample, and reference list are enclosed. Recommendations will be forthcoming from Professors Muneer Ahmad, Miriam Gohara, and Oona Hathaway. I would welcome the opportunity to interview with you and look forward to hearing from you.

Sincerely,

Leighton Fernando G. Cook

Enclosures

Leighton Fernando G. Cook

leighton.cook@yale.edu • (217) 480-6091 • 80 Howe St., Apt. 608, New Haven, CT 06511

EDUCATION

Yale Law School, New Haven, CT
J.D. expected, May 2024
Activities: President, Latinx Law Student Association
Co-Chair, Yale European Law Association
Managing Editor of Submissions, *Yale Journal of International Law*
1L Representative, First Generation Professionals
2023 Thomas Swan Barristers' Union Mock Trial Competition
Dean's Advisor

Cornell University, College of Arts and Sciences, Ithaca, NY
B.A., *summa cum laude*, German Area Studies and History, May 2018
Senior Honors Thesis: "Literary Multilingualism in the Turkish-German Borderlands"
Mellon Mays Undergraduate Fellow, Research Paper: "The Failure of Identity Integrity in Zafer Şenocak's *Perilous Kinship*"
Minors: Latina/o Studies, Inequality Studies, European Studies
Activities: Student Representative, College of Arts and Sciences Curriculum Committee
Co-Chair, 2018 Latinx Ivy League Conference
Co-Chair, Movimiento Estudiantil Chicanx de Aztlán
Volunteer Teaching Assistant, Cornell Prison Education Program
2018-2019 Cornell-Heidelberg Exchange Fellow

EXPERIENCE

ACLU of Northern California, San Francisco, CA — May 2023—Present
Legal Intern, Immigrants' Rights Program
Pursue legal research to support litigation efforts to improve detention conditions, edit legal documents, file California Public Act requests with the California Department of Corrections and Rehabilitation, participate in staff and strategy meetings, and assist in fact-gathering for advocacy efforts.

Worker and Immigration Rights Advocacy Clinic, Yale Law School, New Haven, CT — January 2023—Present
Clinical Student
Collaborate on two student-led teams to promote the passage of a bill expanding Medicaid (HUSKY) eligibility to undocumented residents of Connecticut and to file habeas corpus petitions for noncitizens mandatorily detained under INA § 236(c).

Professor Lucas Guttentag, Yale Law School, New Haven, CT — June 2022—Present
Coordinator for the Immigration Policy Tracking Project (IPTP), Research Assistant
Track changes to Trump-era immigration policies and update any changes online, supervise five law students and approve new entries, and update syllabus for fall 2023 course on "Constitutional and Civil Rights Impact Litigation."

Center for Khmer Studies, Siem Reap, Cambodia — May 2021—Present
English-Language Editor
Regularly edit publications, social media posts, and reports. Provide editorial feedback to the staff.

National Immigration Forum, Washington D.C. — January 2023—May 2023
Legal Intern, Policy & Advocacy Team
Researched and drafted policy documents for public use. Drafted summaries of immigration bills proposed in Congress.

Al Otro Lado, Inc., Los Angeles, CA — August 2022—November 2022
Legal Intern, Litigation Program
Performed legal research and composed memoranda. Bluebooked and edited court documents. Assisted noncitizen clients with deferred action apply for employment authorization. Performed a variety of litigation-related tasks for supervising attorney.

Criminal Justice Advocacy Clinic, Yale Law School, New Haven, CT — January 2022—December 2022
Clinical Student
Successfully applied for a sentence modification for our client on parole. Gathered nearly thirty letters of support, researched the history of parole and statutory changes to sentence modification procedures, and drafted an affidavit in support.

Public Defender Service for the District of Columbia, Washington D.C. May 2022—August 2022
Law Clerk, Immigration Unit
Conducted legal research, wrote legal memoranda, drafted legal documents, such as a motion and special immigrant juvenile status petition, and met with clients. Participated in the Trial Practice Group training program.

Professor Muneer Ahmad, Yale Law School, New Haven, CT June 2022—July 2022
Research Assistant
Researched and co-wrote a memo on the ability of a clinical counselor and social worker to be treated as a member of a legal team and the affects of FERPA and mandatory reporting on their ability to play such a consulting role.

Medical Legal Partnership, HAVEN Free Clinic, New Haven, CT September 2021—May 2022
Certified Spanish-Language Volunteer
Screened uninsured medical patients to ascertain their legal needs in order to refer them to an appropriate legal aid agency.

International Refugee Assistance Project (IRAP), New Haven, CT October 2021—April 2022
Student Volunteer
Interviewed Afghan clients applying for humanitarian parole in order to prepare the necessary application materials. Assisted a permanent resident file citizenship paperwork. Screened asylum seekers allowed into the U.S. under a Title 42 exception.

Champaign County Circuit Clerk's Office, Urbana, IL June 2020—August 2021
Legal Clerk
Prepared files for trial, opened new criminal cases, updated docket sheets, and entered court filings into the record. Assisted court patrons, including Spanish speakers, with paying court fines, opening new *pro se* civil cases, and accessing court records.

Barnes & Noble, Champaign, IL October 2019—March 2020
Bookseller, Barista September 2020—May 2021
Provided exceptional customer service; shelved, inventoried, and shipped merchandise; trained new hires on operating the cash registers, using our BookMaster product database, and handselling merchandise; prepared food and beverages and maintained a high-standard of cleanliness in the café. Did not work March – September 2020 due to the COVID-19 pandemic.

SKILLS & INTERESTS

Fluent in Spanish & German, Conversational in French. Enjoy reading contemporary fiction and playing classical violin.

Leighton Fernando G. Cook
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Recommendation Writers

Professor Muneer Ahmad
Sol Goldman Clinical Professor of Law
Yale Law School
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New Haven, CT 06511
muneer.ahmad@yale.edu
(203) 432-4716
Professor for the Worker and Immigrant Rights Advocacy Clinic; Supervisor of Research Assistant position

Professor Miriam Gohara
Clinical Professor of Law and Director, Jerome N. Frank Legal Services Organization
Yale Law School
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(203) 436-9167
Professor for the Criminal Justice Advocacy Clinic

Professor Oona Hathaway
Gerard C. and Bernice Latrobe Smith Professor of International Law and Counselor to the Dean
Yale Law School
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New Haven, CT 06511
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(203) 436-8969
Professor for International Law course; Supervisor of Supervised Analytic Writing Paper

Professional References

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Formerly of the Public Defender Services for the District of Columbia
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Supervisor in the immigration unit during the summer of 2022

Jeremy Jong
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Staff Attorney
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(504) 475-6728
Supervisor for my externship during the fall semester of 2022

Susan W. McGrath
Champaign County Circuit Clerk
101 E. Main St.
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Supervisor from June 2020 to August 2021

YALE LAW SCHOOL
Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 08-JUN-2023

Record of: Leighton Fernando Gaeta Cook Page: 1
Issued To: Leighton Cook
Parchment DocumentID: TWBNF33H

Date Entered: Fall 2021

Candidate for : Juris Doctor MAY-2024

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2021					
LAW	10001	Constitutional Law I:Section A	4.00	CR	J. Driver
LAW	11001	Contracts I: Group 3	4.00	CR	Y. Listokin
LAW	12001	Procedure I: Section B	4.00	CR	J. Suk
LAW	14001	Criminal Law & Admin I: Sect A	4.00	CR	F. Doherty
		Term Units 16.00	Cum Units 16.00		
Spring 2022					
LAW	21227	Legislation	3.00	P	A. Gluck
LAW	21277	Evidence	4.00	P	S. Carter
LAW	21763	International Law	4.00	H	O. Hathaway
		Supervised Analytic Writing			
LAW	30149	CrimJusticeAdvocClinic:Fldwk	2.00	H	F. Doherty, M. Gohara, S. Albertson, K. Barrett M. Orihuela
LAW	50100	RdgGrp: DiscussingPubDefense	1.00	CR	M. Gohara
		Term Units 14.00	Cum Units 30.00		
Fall 2022					
LAW	20459	Reading the Constitution	4.00	P	A. Amar
LAW	20557	Torts and Regulation	3.00	P	D. Kysar
LAW	20611	Immigration Law	4.00	P	A. Kalhan
LAW	30149	CrimJusticeAdvocClinic:Fldwk	2.00	H	M. Gohara, F. Doherty
LAW	50100	RdgGrp: Leading in Crisis	1.00	CR	H. Gerken
		Term Units 14.00	Cum Units 44.00		
Spring 2023					
LAW	21050	Federal Income Taxation	4.00	H	A. Alstott
LAW	21343	Advanced Legal Writing	2.00	H	R. Harrison
LAW	21546	LitigatingCivRtsPolicingImpris	3.00	H	B. Azmy
LAW	30127	Worker&ImmigrantRightsClinic	3.00	H	M. Ahmad, K. Tumlin, M. Wishnie, K. Tyrrell
LAW	30128	Worker&ImmigrantRts:Fieldwork	2.00	H	M. Ahmad, K. Tumlin, M. Wishnie, K. Tyrrell
LAW	50100	RdgGrp:Cntr Domestic Extremism	1.00	CR	R. Post
		Term Units 15.00	Cum Units 59.00		

********** END OF TRANSCRIPT **********

HEATHER ABBOTT, REGISTRAR

Official transcript only if registrar's signature, embossed university seal and date are affixed.

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to recommend Leighton Cook for a clerkship in your chambers.

Leighton was a student in my International Law class in 2022. In that class, he wrote a very strong Supervised Analytic Writing paper. This paper examined the novel use of universal jurisdiction in Germany to try former Syrian government officials for atrocities committed in the Syrian civil war. Germany is unique because it is one of only three countries in Europe to have what Human Rights Watch refers to as, "pure universal jurisdiction." Thus, it is one of a few countries in Europe to have the ability to prosecute Syrian regime officials for crimes committed during the ongoing Syrian Civil War. The paper begins by providing a background of the trials of Syrian officials in Germany, showing how the prosecutions came about as well as the participation of Syrian refugees in these trials. Leighton examines criticisms of universal jurisdiction as neo-colonialist and politically motivated. The paper argues that these criticisms are not wholly applicable to the German trials of Syrian officials, in part because of the direct participation of Syrian refugees in the process. The paper then concludes with an examination of the possibilities the trials open up for future universal jurisdiction cases. It is a very strong paper—creative, thoughtful, well-written, and well-researched. Leighton came up with the idea for the paper in the first week of class and worked independently during the term, checking in a few times in the course of the term to make sure he was headed in the right direction. I learned a lot from the final paper, and he received a very well-deserved H for the paper and the class.

Leighton aspires to a career as a public interest lawyer. Leighton comes from a low-income immigrant family. While he was growing up, his mother faced the threat of deportation several times. She narrowly avoided deportation Leighton's senior year of high school, and the experience of his mother's hearing in front of an immigration judge is what motivated Leighton to pursue a legal career. Informed by his personal experiences, Leighton has worked toward helping immigrants caught up in the criminal legal system and helping detained immigrants. He interned last summer with the Public Defender Services where he worked to defend immigrants from criminal charges that could lead to their deportation. In the fall of 2022, he volunteered with Al Otro Lado, Inc. to bring suit against ICE and its private contractors for abuses against detainees. Last semester, he worked on a Workers and Immigrant Rights Advocacy Clinic case in which he helped file habeas petitions for immigrants mandatorily detained for criminal convictions pursuant to INA § 236(c). This summer Leighton is working at the ACLU of Northern California to expose and rectify abuses at detention centers located in California. After clerking, he hopes to continue this important work through a fellowship with an organization similar to the ACLU of Northern California or Al Otro Lado, Inc.

At YLS, Leighton has served as President of the Latinx Law Students Association. During his tenure, Leighton worked closely with the treasurer to revamp LLSA's fundraising strategy, which expanded the group's resources, allowing the organization to expand programming for LLSA's members—including panels on matters of shared interest, including a recent one on the future of immigrant rights, as well as important community-building activities.

For all these reasons, I believe that Leighton will make a strong law clerk. Please feel free to e-mail me at oona.hathaway@yale.edu or call me at 203-436-8969 with any questions you may have.

Sincerely,

Oona A. Hathaway
Gerard C. and Bernice Latrobe Smith Professor of International Law
Yale Law School

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to enthusiastically recommend Leighton Cook for a clerkship in your chambers. Leighton is a thoughtful and highly motivated student with a record of academic accomplishment: a summa cum laude graduate of Cornell, he has distinguished himself in his classes, clinics, and activities at Yale Law School as an insightful individual committed to the public interest. He has the strong research and writing skills, work ethic, and sound judgment to excel as a law clerk. I believe he would make an excellent addition to your chambers.

I have worked closely with Leighton over the past semester in the Worker and Immigrant Rights Advocacy Clinic (WIRAC) at Yale Law School which I co-direct. WIRAC is an intensive clinic in which students provide direct representation to poor and marginalized individuals and communities, in both litigation and non-litigation matters, on a range of issues related to immigration, immigrants' rights, and labor. The clinic combines a weekly seminar on lawyering, legal ethics, and relevant substantive law with intensive faculty supervision of students engaged in client representation. At a law school filled with challenging courses and activities, WIRAC is particularly demanding. The docket typically features several complex federal litigation matters, which in recent years have included high-profile cases such as Batalla Vidal v. Baran, one of nine cases challenging the termination of the Deferred Action for Childhood Arrivals program (DACA) that were decided by Department of Homeland Security v. Regents of California, 140 S. Ct. 1891 (2020); Reid v. Donelan, 17 F.4th 1 (1st Cir. 2021) (recognizing that unreasonably prolonged, no-bond immigration detention under 8 U.SC. § 1226(c) violates the Due Process Clause); and JSR v. Sessions & VFB v. Sessions, 330 F. Supp. 3d 731 (D. Conn. 2018) (federal habeas action that reunited children in Connecticut forcibly separated from their parents under Trump Administration's "zero tolerance" policy). In addition, students work on a series of ambitious non-litigation advocacy projects on behalf of worker and immigrant communities.

Leighton has worked on two matters in the clinic, both of which I have supervised: the representation of noncitizens facing prolonged, no-bond immigration detention; and the representation of a community-based organization advocating for legislative expansion of Connecticut's Medicaid program to all state residents without regard to immigration status. In both matters, Leighton has been careful, methodical, and conscientious. In the representation of his detained noncitizen clients, Leighton undertook a broad array of work, including: interviewing clients in detention; researching and drafting a habeas petition; analyzing the immigration consequences of a client's criminal convictions; researching and drafting a motion to seal and a motion to proceed pseudonymously; and drafting client and witness declarations. In each of these tasks, Leighton approached the work with seriousness and carried it out with skill. He was dogged in his research and worked assiduously to produce crisp, well-reasoned written work product. In the legislative advocacy matter, he helped to research and draft an excellent memo on the impact of Medicaid utilization on the public charge ground of inadmissibility under federal immigration law. That memo, prompted by a question from a state legislator, was then circulated widely in the Connecticut legislature and helped to allay one concern about the legislation.

In the summer of 2022, Leighton also worked as a research assistant for me. He researched and co-wrote an outstanding memo analyzing the legal and ethical limitations of mental health counselors serving as part of a law school clinic's legal team. The memo considered the duty of confidentiality under the Connecticut Rules of Professional Conduct, attorney-client privilege, the Federal Educational Records Privacy Act (FERPA), and the mandatory reporter provisions of Connecticut law. In addition to researching the relevant statutes, codes, and caselaw, Leighton researched the secondary literature on interdisciplinary practice. The end product provided a nuanced consideration of the issues and clearly stated, well-supported conclusions, which informed the practice of our clinic this past academic year.

Finally, I note that in addition to devoting himself to excellence in his own course of study, Leighton has worked to support that of his classmates. In particular, as president of the Latinx Law Student Association, Leighton has provided critical mentorship and leadership to other Latinx students, including first-generation professionals like himself. This reflects Leighton's generosity of spirit and his commitment to strengthening the communities of which he is a part. These qualities will serve him well as a law clerk and beyond.

Thank you for your consideration. Please do not hesitate to contact me if I can be of additional assistance. I can be reached via email at muneer.ahmad@yale.edu, or by phone at (203) 432-4716.

Sincerely,

Muneer I. Ahmad
Sol Goldman Clinical Professor of Law

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Clerkship Recommendation for Leighton Cook

Dear Judge Davis:

I write with great pleasure to recommend Leighton Cook for a judicial clerkship. Leighton was a student in my Criminal Justice Advocacy Clinic (CJAC) for two semesters spanning his first and second year in law school. Leighton worked on a two-person student team under my supervision to win a sentencing modification for a client who sought a termination of his parole supervision. Leighton's top-notch work in CJAC included a great deal of client counseling, drafting legal memoranda, hearing preparation, and work with our client's supporters and witnesses. Leighton will make an excellent judicial clerk.

Leighton and his clinic partner worked on our client's sentencing modification from scratch. They amassed the evidence, developed the case, theory, drafted the brief, and researched and wrote memos about legal issues we encountered along the way. All aspects of Leighton's work were strong. He demonstrated tenacity and commitment to our client and his case, even though it meant that he had to delay participation in an immigration clinic in which he had great interest but that posed a conflict with our clinic in order to see our client's case through. Aspects of Leighton's work that stood out were his patiently teasing out our case docket's status in the busy county court in which our case was heard. Leighton's own experience working in a court clerk's office made him a particularly amiable choice to "pester" the court clerk's office when our case docketing became complicated. Leighton never seemed to tire of the puzzle of legal procedures our case presented or of his dialogue with the local court officers who helped us navigate a system unfamiliar to all of us. This may seem ministerial, but far from it, it was a critical piece of our case advocacy and management, and one that reflects Leighton's strength as a case manager, which is an important aspect of a judicial clerkship.

More substantively, when the prosecutor in our case presented us with a possible settlement but needed clarification about whether it would be legally permissible, Leighton turned around a thorough, clearly written legal memorandum that considered all aspects of the question and concluded that the proposed solution would violate the applicable statute. His conclusion led us to decline the deal, which would have left our client under supervision. The court ruled in our client's favor and terminated his parole altogether, thanks to Leighton's research and legal conclusion. Leighton also co-authored a top-notch memo on whether our parole board possessed the authority to discharge parole itself, without involvement of the court. Both pieces of work demonstrate Leighton's strength in identifying and grappling with novel or unresolved legal questions and then making recommendations based on relevant authority. This is a second reason I am confident that he will excel as a law clerk.

Finally, Leighton worked assiduously with our client to prepare him for his written and oral statements at the sentencing modification hearing. He also worked with our client's numerous supporters to advise them on their letters and statements and to collate and present those to the court. Leighton prepared our opening and closing statements as well. Though he deferred to his clinic partner to deliver the in-court argument, Leighton sat at counsel table next to our client, providing steady and wise support.

It was always a pleasure to work with Leighton, who was consistently well-prepared and thorough in his supervision meetings, written work product, and hearing preparation. He worked well with his clinic partner and was also quite capable of turning around the legal memos I described quickly and independently. He always collaborated with good humor and maintained equanimity even when our case took unexpected turns and required a reconsideration of our case strategy. Leighton balanced beautifully the passion of a zealous advocate with the competence, steady hand, and meticulousness of a counselor. These qualities combined with his strong research and writing and case management skills have prepared him well for a judicial clerkship.

I recommend Leighton to you gladly and without reservation.

Thank you for your consideration.

Sincerely,

/s/ Miriam S. Gohara

Clinical Professor of Law

Miriam Gohara - miriam.gohara@yale.edu

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WRITING SAMPLE I

I wrote the attached writing sample in my Advanced Legal Writing course during the spring semester of 2023. In this memorandum, I analyze whether Article 2 of the Illinois Commercial Code applies to a contract between my client and another corporation. This corporation had sued my client for damages due to issues arising from a diesel generator designed and sold by my client. This memo is entirely my own and it reflects light edits made in response to some high-level feedback provided by a student teaching assistant.

To: Professor Robert Harrison

From: Leighton Fernando G. Cook

Date: April 30, 2023

Re: Article 2 of the ICC applies to this contract

Question Presented

Our client Blohm + Voss KG ("BV") agreed to design and fabricate a "diesel engine, generator, and auxiliary equipment" for Ameresco Inc. ("Ameresco") per the Puerto Rico Cogeneration Agreement ("PRCA"). Following issues with the operation of the diesel generator, Ameresco is suing BV for damages. As a preliminary matter, we would like to determine whether the PRCA between BV and Ameresco is subject to Article 2 of the Illinois Commercial Code ("ICC"). Is this contract a "transaction in goods" under Article 2 of the ICC?

Brief Answer

An Illinois court is likely to find that Article 2 of the Illinois Commercial Code applies to the PRCA. The diesel generator provided for in this contract likely constitutes "goods" because it has been identified in the PRCA by the parties and it is movable pursuant to 810 ILL. COMP. STAT. 5/2-105. As the PRCA applies to both goods and services, however, it is a "mixed" contract. Nevertheless, this contract was written for the primary purpose of delivering and installing a "diesel engine, generator, and auxiliary equipment." PRCA at 1. As a result, a court is likely to find that the contract is primarily for the sale of goods, with the services only serving an incidental purpose.

Statement of Assumed Facts

BV is a German shipbuilding and engineering company. It submitted a base bid in 1981 to Ameresco under which BV would supply Ameresco with a "diesel engine, a diesel generator, and other auxiliary equipment" (referred to collectively as "the Equipment" in the PRCA) for 61,700,000 Swedish Kronor. PRCA at 3. Ameresco had previously solicited bids as it desired to build its own cogeneration facility to provide electricity, steam, and chilled water to its manufacturing plant in Juana Díaz, Puerto Rico while lowering its energy costs. Subsequently, Ameresco informed BV that it had selected BV's bid. On April 23, 1982, BV entered into a formal agreement with Ameresco Inc. ("Ameresco"). *Id.* at 1.

The PRCA formalized that BV would "design, fabricate, test, deliver to Purchaser's [Ameresco's] site, provide technical guidance and assistance for installation and start-up, and sell the Equipment to Purchaser, and Purchaser shall purchase the Equipment from Seller [BV]." *Id.* at 2. As consideration, Ameresco would pay BV 61,700,000 Swedish Kronor. *Id.* at 3. The contract stipulated that BV would "develop the final design of," "fabricate," "factory test," and "pack, handle, and deliver the Equipment to Purchaser's facility." *Id.* at 5-7. Ameresco, on the other hand, would be responsible for "unloading, unpacking and installing the Equipment" at its facility. *Id.* at 9. Additionally, the agreement included a warranty "that the Equipment will be free from defects in material, workmanship and design for a period of twelve (12) months from the date of Final Acceptance." PRCA at 11. Finally, the agreement allocated responsibility for paying sales tax between BV and Ameresco depending on which taxing authority imposed the sales tax. *Id.* at 14.

Since the Equipment was delivered and installed, the diesel generator has been allegedly beset by a variety of issues, including microseizures, abnormal wear on the cylinder liners,

excessive particulate emissions, cracks in the generator rotor, high operating temperatures, and abnormal piston wear in the diesel engines. Ameresco is suing BV for damages stemming from issues with the diesel generator of the electrical generation station.

The parties agreed that their contract would be governed by the laws of the State of Illinois. *Id.* at 15. Ameresco is a corporation based in Illinois. For this reason, we aim to determine whether the PRCA is a "transaction in goods" so as to make it subject to Article 2 of the ICC.

Applicable Statutes

1. 810 ILL. COMP. STAT. 5/2-102 (2022):

   Unless the context otherwise requires, this Article applies to transactions in goods.

2. 810 ILL. COMP. STAT. 5/2-105 (2022):

   "Goods" means all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.

3. 810 ILL. COMP. STAT. 5/2-106 (2022):

   In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

4. 810 ILL. COMP. STAT. 5/2-501 (2022):

   The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so

identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties.

Discussion

The question this memo concerns itself with is whether the PRCA contains goods such that Article 2 of the ICC would apply to govern the contract. Article 2 only "applies to transactions in goods." 810 ILL. COMP. STAT. 5/2-102 (2022). Therefore, we must determine whether the PRCA contains "goods" under the ICC. Because the PRCA is a "mixed" contract as it includes both goods and services, we must additionally determine whether the predominant purpose of the PRCA is to sell goods. If the PRCA contains goods and its predominant purpose is to sell goods, then Article 2 of the ICC most likely applies to this contract.

1. The Equipment Constitutes "Goods"

First, we must determine whether the PCRA contains "goods" per the definition of the ICC, which is based off of the Uniform Commercial Code ("UCC"). According to the ICC, "'[g]oods' means all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale." 810 ILL. COMP. STAT. 5/2-105 (2022). The Seventh Circuit clarified that the term "goods" "includes all tangible personal property" and it "should be viewed as being broad in scope." *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 580 (7th Cir. 1976); *see also Republic Steel Corp. v. Pennsylvania Eng'g Corp.*, 785 F.2d 174, 181 (7th Cir. 1986) (arguing that Illinois law takes into account "the broad coverage of the U.C.C." and the "need for uniformity in commercial transactions"). This broad reading of "goods" is necessary in order to "achiev[e] uniformity in commercial transactions," which is the

main purpose behind the UCC. *Pittsburgh-Des Moines Steel Co.*, 532 F.2d at 580. Furthermore, the ICC stipulates that the identification of goods in a contract can occur when "explicitly agreed to by the parties." 810 ILL. COMP. STAT. 5/2-501 (2022).

With this broad definition in mind, we turn to the contract to determine if it includes "goods." The contract stipulates that the Seller (BV) will "sell the Equipment to Purchaser, and Purchaser shall purchase the Equipment from Seller." PRCA at 15. Thus, the parties have identified the goods in the contract pursuant to the ICC. 810 ILL. COMP. STAT. 5/2-501 (2022). The equipment sold by BV to Ameresco includes "a diesel engine, generator, and auxiliary equipment." *Id.* at 1. All this equipment is "movable" by virtue of the fact that the Seller must deliver the goods to the Purchaser's site in Puerto Rico. *Id.* at 2, 7. It does not matter that this equipment is large and cumbersome. *See Pittsburgh-Des Moines Steel Co.*, 532 F.2d at 580 ("[W]hile the finished tank was scarcely one to be taken off the shelf, we are unaware of any authority that specially manufactured small dies should be goods and a very large tank not so classified."). Thus, under the liberal interpretation of Article 2, the equipment provided for in this contract constitutes "goods" because it has been identified in the PRCA by the parties and it is movable. Nevertheless, this contract also includes the provision of services and so we must determine whether such a "mixed" contract as a whole is governed by Article 2.

2. The PRCA's Predominant Purpose is the Sale of Goods

In deciding whether a "mixed" contract is governed by Article 2, we must determine whether the predominant purpose of the PRCA is for the sale of goods. Article 2 only applies to a mixed contract if its predominant purpose is "for the sale of goods with services incidental thereto." *Tivoli Enterprises, Inc. v. Brunswick Bowling & Billiards Corp.*, 646 N.E.2d 943, 948 (Ill. App.

Ct. 1995). *Bonebrake v. Cox* introduces a test, adopted by multiple federal and state courts with jurisdiction in Illinois, which is instructive in making that determination:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

Meeker v. Hamilton Grain Elevator Co., 442 N.E.2d 921, 922 (Ill. App. Ct. 1982) (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)).

A contract's status as "mixed" does not automatically exclude it from inclusion under Article 2. Instead, the predominant purpose of the contract is determinative. Here, the PRCA refers to both parties as "purchaser and seller" and states that the "Seller shall . . . sell the Equipment to Purchaser, and Purchaser shall purchase the Equipment from Seller." PRCA at 2. "These terms signify that a sale of goods was predominant and services incidental." *Meeker*, 442 N.E.2d at 922–23; *but cf. Nitrin, Inc. v. Bethlehem Steel Corp.*, 342 N.E.2d 65, 78 (Ill. App. Ct. 1976) (holding that the contract was intended "for the provision of services exclusively" in part because the contract denominated the two parties as "Owner" and "Contractor" and not as "buyer" and "seller."). Therefore, the language of the contract points to its "predominant factor" as a "transaction of sale." *Bonebrake*, 499 F.2d at 960.

Second, while services were included in the contract, these services were geared towards the sale of the diesel-generator set. The Seventh Circuit found in *Republic Steel Corp. v. Pennsylvania Eng'g Corp.* that, although "design, engineering, and purchase-agency services . . . were substantial," those services "led directly to the construction of the furnaces which [was] the heart of the [Agreement]." 785 F.2d at 181-82. As a result, the court held that the parties' agreement was "predominately a contract for the sale of the two furnaces" and the

included services were merely "incidental thereto." *Id.* at 182; *see also Bonebrake*, 499 F.2d at 959 (arguing that "the fact that the contract involved substantial amounts of labor" does not exclude a contract from the UCC). Similarly, here, the PRCA contains services, such as designing, fabricating, and testing the diesel-generator set. PRCA at 2. Additionally, BV agrees to "provide technical guidance and assistance for installation and start-up." *Id.* Nevertheless, these services are provided to allow for the construction and sale of the diesel-generator set. The "heart" of the agreement is the purchase of the diesel-generator set by Ameresco, which will allow them to generate their own electricity.

In some circumstances, construction contracts have been held to have a predominant purpose of providing services. In *Boddie v. Litton Unit Handling Syst.*, an Illinois court held that "general construction contracts . . . have as their primary thrust the rendition of services rather than the sale of goods." 455 N.E.2d 142, 150 (Ill. App. Ct. 1983). However, that construction contract dealt primarily with services that modified and altered a pre-existing building. *Id.* ("We note that contract bears the legend 'Construction Contract' and requires Orr to (1) complete the remaining construction work for the mail processing center; (2) complete various alterations and modifications on the building; (3) complete the construction of exterior utilities and services, including drainage, pavement, walks, fencing and demolition work; (4) construct caisons, including excavation, metal casings, concrete and related work; (5) construct lookout galleries from prefabricated modules; and (6) furnish, install, connect, adjust, and test a complete package-sorting conveyor system."). The Agreement between BV and Ameresco, on the other hand, focuses on the construction of a new diesel-generator set for purchase by Ameresco. The contract in *Boddie* is made up primarily of services to finish the construction of a building

whereas the PRCA includes services that are incidental to the purchase of a new diesel-generator set by Ameresco.

Third, the warranty included in the PRCA primarily covers the goods provided, the diesel-generator set, and not the incidental services. The inclusion of a warranty in the agreement demonstrates that it "runs to the goods . . . not the services incidental thereto." *Tivoli*, 646 N.E.2d at 948. In the PRCA, the "Seller warrants that the Equipment will be free from defects in material, workmanship and design for a period of twelve (12) months from the date of Final Acceptance." PRCA at 11. While the warranty does stipulate that "the Equipment shall be fabricated in accordance to the Specifications," this provision is best understood as a service that is provided with the predominate goal of the construction and sale of the diesel-generator set. *Id.* at 12. The predominate thrust of the warranty is to protect the goods provided.

Fourth, the PRCA includes an allocation of responsibility for paying sales tax between BV and Ameresco depending on the taxing authority imposing the sales tax. *Id.* at 14. A sales tax is "found in the sale of goods, but not services." *Tivoli*, 646 N.E.2d at 948. This provision of the contract indicates that the parties expected that they would need to pay sales tax on the purchase of the diesel-generator set. Therefore, this provision is an additional factor in favor of interpreting the contract as one whose predominant purpose is the sale of goods.

Thus, the language of the agreement, the incidental nature of the services provided in the agreement, the fact that the warranty predominantly covers the diesel generator set, and the contract provision covering payment of sales tax demonstrate that the PRCA's predominant purpose is likely the sale of goods. As a result, a court in Illinois is likely to find that this "mixed" contract is covered by Article 2.

Conclusion

An Illinois court is likely to hold that Article 2 of the ICC applies to the PRCA. First, the PRCA likely contains goods because the equipment provided for therein has been identified by both parties in the contract and is movable. Second, a court is likely to find that the predominant purpose of the PRCA is the sale of goods. The PRCA is a "mixed contract" as it contains both the provision of goods, the diesel-generator set, and the provision of services. Nevertheless, multiple courts have held that a "mixed" contract is covered by Article 2 as long as its primary purpose is to provide for the sale of goods. Four factors point to the contract being predominantly a contract of sale: (1) the language of the agreement, (2) the incidental nature of the services provided, (3) the warranty predominantly covering the diesel generator, and (4) the allocation of responsibility for paying sales tax. Accordingly, a court is likely to find that Article 2 of the Illinois Commercial Code applies to the PRCA because it contains goods and its predominant purpose is the sale of those goods.

Leighton Fernando G. Cook
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WRITING SAMPLE II

I wrote the attached writing sample during my externship with Al Otro Lado, Inc. in the fall of 2022. In this memorandum, I examine how courts in the Ninth Circuit interpret the second prong of the "substantially prevail" test in Freedom of Information Act cases. This second prong allows litigants to qualify for attorney's fees if they can prove that they "substantially prevailed" through "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." Additionally, I investigate how a litigant can satisfy the second prong of this test. This memorandum has not been edited by others.

To: Attorney Jeremy Jong

From: Leighton Fernando G. Cook

Date: September 23, 2022

Re: A plaintiff substantially prevails if they can prove a "causal nexus" between their FOIA litigation and the government's disclosure of information

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Question Presented

In order to qualify for attorney's fees in a Freedom of Information Act (FOIA) case, a plaintiff can prove that they "substantially prevailed" through "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii)(II) (2022). How do courts in the Ninth Circuit interpret this second prong of the "substantially prevail" test? Additionally, what must be shown to demonstrate that the agency has had "a voluntary or unilateral change in position" in the Ninth Circuit?

Short Answer

There must be a "causal nexus between the litigation and the voluntary disclosure or change in position by the Government" for a plaintiff to be eligible to recover attorney's fees. *First Amend. Coal. v. U.S. Dep't of Just.*, 878 F.3d 1119, 1128 (9th Cir. 2017). A court must make three factual findings to determine whether a litigant has "substantially prevailed": "(1) when the documents were released, (2) what actually triggered the documents' release, and (3) whether [the plaintiff] was entitled to the documents at an earlier time." *Id.* at 1129 (alteration in original) (internal quotation marks omitted) (quoting *Church of Scientology v. U.S. Postal Serv.*, 700 F.2d 486, 492 (9th Cir. 1983)). Therefore, plaintiffs must demonstrate that they suffered a

lengthy delay between the filing of the FOIA request and the release of the requested documents. *Id.* Additionally, plaintiffs must establish that the litigation served as the trigger for the documents' release. *Id.* at 1129-30. Finally, plaintiffs must prove they were entitled to the documents they requested at an earlier time. *Id.* at 1130. Only when all three factors weigh in favor of the plaintiff will a court find that they are eligible for attorney's fees. *Id.*

Discussion

A litigant has two paths to proving that they "substantially prevailed" in a FOIA case so as to qualify for attorney's fees. They must receive relief either through "(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E). For our current purposes, we are primarily concerned with the second prong of the test. The leading case in the Ninth Circuit for interpreting this second prong is *First Amend. Coal. v. U.S. Dep't of Just.*, 878 F.3d 1119 (9th Cir. 2017). This case holds that pursuant to the "catalyst theory," there must be a "causal nexus between the litigation and the voluntary disclosure or change in position by the Government."[1] *First Amend. Coal.*, 878 F.3d at 1128. Essentially, the litigant must prove with "convincing evidence" that their action "had a substantial causative effect on the delivery of the information. *Id.* at 1128 (quoting *Church of Scientology*, 700 F.2d at 489).

[1] See *First Amend. Coal. v. U.S. Dep't of Just.*, 878 F.3d 1119, 1127 (9th Cir. 2017) for a discussion of the history of the catalyst theory of recovery. The catalyst theory of recovery was originally developed in *Church of Scientology v. U.S. Postal Serv.*, to allow for recovery if the prevailing party "substantially prevailed" even though they did not obtain relief on the merits. 700 F.2d 486, 489 (9th Cir. 1983). This catalyst theory was subsequently employed by the Ninth Circuit and other circuit courts. However, the Supreme Court ruled in 2001 that the catalyst theory was inapplicable to the recovery of attorney's fees under the Fair Housing Amendments Act and the American with Disabilities Act. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 605 (2001). In 2007 Congress amended FOIA so that *Buckhannon* would not apply. *First Amend. Coal.* is the first opportunity the Ninth Circuit has had since the 2007 amendment to determine whether the causation standard under the catalyst theory in *Church of Scientology* was restored by the amendment. The Ninth Circuit had abrogated *Church of Scientology* as it applied to FOIA via analogy to *Buckhannon* in *Oregon Nat. Desert Ass'n v. Locke.*, 572 F.3d 610, 614 (9th Cir. 2009).

In *First Amend. Coal.* Judge Block delineated three factual findings a court must make to determine whether a litigant has substantially prevailed under the second prong: "(1) when the documents were released, (2) what actually triggered the documents' release, and (3) whether [the plaintiff] was entitled to the documents at an earlier time." *Id.* at 1129 (alteration in original) (internal quotation marks omitted) (quoting *Church of Scientology*, 700 F.2d at 492). This section of the court's opinion is not binding.[2] Nevertheless, this three-part test has been employed by multiple district courts in the Ninth Circuit. This memo will further investigate the requirements of each of the three factual findings. In each section, I will commence with the analysis in *First Amend. Coal.* before exploring more recent applications in order to illustrate how courts have applied this test.

1. Timeline

Generally, a longer time period between the commencement of litigation and the release of the documents will help establish that there was a "causal nexus." A lengthy delay in the release of documents helps to establish that "plaintiff faced formidable opposition by the government at every juncture," and that only the "'dogged determination' of the plaintiff" resulted in a successful outcome. *First Amend. Coal.*, 878 F.3d at 1129 (quoting *Exner v. FBI*, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978)). In *First Amend. Coal.*, the plaintiff only succeeded in obtaining a memorandum from the Office of Legal Counsel (OLC) regarding the legality of a Central Intelligence Agency (CIA) strike against Anwar al-Awlaki (OLC-CIA memo) two-and-

[2] See *Schoenberg v. FBI*, No. LACV1801738JAKAGRX, 2020 WL 4937813, at *4 (C.D. Cal. May 8, 2020), *aff'd*, 2 F.4th 1270 (9th Cir. 2021) for a discussion of the panel's split in *First Amend. Coal*. Only Part II of Judge Block's opinion in *First Amend. Coal.* is binding precedent in the Ninth Circuit. Part II established that there is a causal nexus requirement under the catalyst theory. Judge Murguia concurred in Part II of Judge Block's opinion, 878 F.3d at 1139, and Judge Berzon concurred only in the judgement. *Id.* at 1130. Nevertheless, in *Schoenberg* Judge Kronstadt elected to apply the three-part test outlined in Part III of *First Amend. Coal.* because "it aligns with Judge Murguia's endorsement of the catalyst theory" and other district courts in the Ninth Circuit have applied it. 2020 WL 4937813, at *5.

a-half years after litigation was commenced and nearly one year and seven months after the "DOJ White Paper," which contained the same legal reasoning in the OLC-CIA memo, was leaked to the press. *Id.* at 1123-1125, 1129. The Ninth Circuit held that the lengthy litigation demonstrated that the First Amendment Coalition was "met with abject resistance" from the government. Thus, the first factual finding weighed in favor of the plaintiff.

Likewise, in *Schoenberg v. FBI* the nearly two-year gap between the filing of the plaintiff's FOIA request with the Federal Bureau of Investigation (FBI) and the filing of the lawsuit, only three months after which the FBI released the records, weighed in the plaintiff's favor for eligibility for attorney's fees. No. LACV1801738JAKAGRX, 2020 WL 4937813, at *5 (C.D. Cal. May 8, 2020), *aff'd*, 2 F.4th 1270 (9th Cir. 2021). A nine-month gap between the initiation of litigation and the disclosure of previously redacted information, preceded by a nine-month gap between the filing of the FOIA request and the initiation of the litigation, also factored in the plaintiff's favor for attorney's fees in *Berryhill v. Bonneville Power Admin.*, No. 3:19-CV-02001-SB, 2021 WL 839160, at *4 (D. Or. Mar. 5, 2021).

In comparison, in *Munene v. Talebian* the court held that the first factual finding did not weigh in the plaintiff's favor because the plaintiff received their files within two months after filing the lawsuit and without any court intervention. No. C22-0243-LK-SKV, 2022 WL 3975141, at *3 (W.D. Wash. Sept. 1, 2022). Similarly, in *Withey v. FBI* the court held that the plaintiffs were merely correcting an error and not changing their position because the requested records were released as soon as the defendant "finally located the documents through updated searches." No. C18-1635-JCC, 2021 WL 2646480, at *3 (W.D. Wash. June 28, 2021). Thus, plaintiffs did not "*convincingly* demonstrate that their post-complaint activities resulted in a voluntary or unilateral change in Defendant's position." *Id.* Furthermore, in *Rich v. U.S.*

Citizenship & Immigr. Servs. the court held that the plaintiff did not provide "convincing evidence" that she substantially prevailed because, among other faults, the case was resolved in only two months and without court intervention. No. C20-0813JLR, 2020 WL 7490373, at *3 (W.D. Wash. Dec. 21, 2020).

2. Trigger

A plaintiff must demonstrate that the filing of the FOIA case served as the trigger for the release of documents to be eligible for attorney's fees. In *First Amend. Coal.* the court held that the trigger for the release of the OLC-CIA memo came from plaintiff's attempt to vacate the district court's previous order granting the government's motion of summary judgement. 878 F.3d at 1129. As a result of plaintiff's "dogged determination," the district court had directed the parties to discuss whether the case was now moot as a result of the Second Circuit court order to disclose a redacted version of an Office of Legal Counsel memo pertaining to the Department of Defense (OLC-DOD memo) in parallel litigation. *Id.* The Second Circuit order to disclose the OLC-DOD memo followed after the leak of the DOJ White Paper to the press and its subsequent official disclosure by the Office of Information Policy, as the information in the OLC-DOD memo was similar to the information in the DOJ White Paper. *Id.* at 1123-24. During these discussions, the government voluntarily disclosed the OLC-CIA memo, which had been written six months prior to the OLC-DOD memo. *Id.* at 1125. The OLC-DOD memo discussed the legality of lethal operations against al-Awlaki, a senior al-Qaeda official, by the Department of Defense and the CIA under both the Constitution and federal criminal law. *Id.* The earlier OLC-CIA memo, however, only discussed the legality of such operations by the CIA under the Constitution. *Id.*

Following the disclosure of the OLC-CIA memo, the district court had declined to grant attorney's fees because it held that the government had released the OLC-CIA memo following the Second Circuit order in the parallel litigation and not as a result of "the ruling in this case." *First Amend. Coal.*, 878 F.3d at 1125-1126. Additionally, it found that the case was now moot as both parties conceded that all substantive issues were resolved following the discussion. *Id.* at 1125. The Ninth Circuit disagreed that the parallel litigation was the trigger for the release of the documents. Instead, it found that the discussions between the First Amendment Coalition and the government regarding the mootness of the case resulted in the government voluntarily disclosing the OLC-CIA memo. *Id.* at 1130. Therefore, the Ninth Circuit held that this litigation "triggered the release of additional or key documents." *Id.* (quoting *Van Strum v. Thomas*, 881 F.2d 1085, 1085 (9th Cir. 1989)). As a result, this factual finding weighed in favor of plaintiff's eligibility for attorney's fees.

In *Schoenberg v. FBI*, the court likewise investigated the "trigger" for the release of the information sought in a FOIA Request. The court examined the released records to determine to what extent the information contained therein had been revealed as a result of the release of an Office of the Inspector General (OIG) Report or the FOIA request. The court determined that some of the information was unredacted following the release of identical information in the OIG report. *Schoenberg*, 2020 WL 4937813, at *7. Therefore, the FOIA request did not trigger the release of that unredacted information. *Id.* However, some of the unredacted information was contained neither in the previously released OIG report or a separately released search warrant. *Id.* Thus, the court found "substantial support" that the plaintiff's FOIA request "triggered the disclosure of this narrower category of information." *Id.* at *8.

In contrast, the court found in *Munene v. Talebian* that the FOIA request was not the trigger for the release of the requested records as the Executive Office for Immigration Review (EOIR) had already begun processing the plaintiffs' requests soon after receiving them. 2022 WL 3975141, at *3. One of the plaintiffs even received their records before the lawsuit was filed. *Id.* Additionally, the EOIR had already requested the records from storage for two of the plaintiffs prior to the initiation of this lawsuit. *Id.* As a result, the court found that the EOIR simply could not have released those documents earlier and the lawsuit played no role in the EOIR's decision to release the records. *Id.* While the court did acknowledge that the EOIR received four records but failed to send them until after the filing of the lawsuit, this was merely a correction of an error and not a change in position. *Id.* The "mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that a complainant has 'substantially prevailed.'" 2022 WL 3975141, at *3 (quoting *First Amend. Coal.*, 878 F.3d at 1128). Thus, there was no causation. *Id.*

Similarly, in *Berryhill v. Bonneville Power Admin.* plaintiff failed to establish that the filing of the lawsuit was the trigger solely because the Bonneville Power Administration released the requested records after the filing of the lawsuit. 2021 WL 839160, at *5. In *Rich v. U.S. Citizenship and Immigr. Servs.* the requested records were released once the FOIA request reached the top of the queue. 2020 WL 7490373, at *3. Therefore, the lawsuit was not the trigger as U.S. Citizenship and Immigration Services did not change its actions following the filing of the lawsuit. *Id.* Finally, although the plaintiff's records in *Shaklee & Oliver, P.S. v. U.S. Citizenship & Immigr. Servs.* were delayed by months, this delay was due to the COVID-19 pandemic and a large backlog of FOIA requests. No. 20-CV-0806-RAJ, 2021 WL 4148175, at

*3 (W.D. Wash. Sept. 13, 2021). The lawsuit did not trigger the records release; instead, the trigger was merely the resumption of normal operations. *Id.*

Beyond the timing of the release of records vis-à-vis the filing of the lawsuit, a plaintiff cannot benefit from a court order in parallel litigation that results in the release of the requested records to claim attorney fees. *S. Cal. Pub. Radio v. U.S. Small Bus. Admin.*, No. 220CV06490ODWASX, 2021 WL 6752245, at *3 (C.D. Cal. Sept. 3, 2021). Likewise, a voluntary executive decision, such as an "unprecedented declassification decision of the President," cannot serve as the basis to demonstrate that the lawsuit was the "trigger" for the release of records. *Poulsen v. Dep't of Def.*, No. 17-CV-03531-WHO, 2019 WL 2568882, at *5 (N.D. Cal. June 21, 2019), r*ev'd and remanded*, 994 F.3d 1046 (9th Cir. 2021). "There may be a host of reasons why the Government has voluntarily released information after the filing of a FOIA lawsuit. One obvious example is that previously classified information may have subsequently become unclassified for reasons having nothing to do with the litigation." *Id.* (quoting *First Amend. Coal.*, 878 F.3d at 1128). Such an executive decision represents a change in position that is insufficient to demonstrate causation and to collect attorney's fees. *Id.*

3. Earlier Entitlement

Finally, the fact that a plaintiff was entitled to the earlier release of the records weighs in their favor for eligibility of attorney's fees. The Ninth Circuit held in *First Amend. Coal.* that the district court was at fault for forcing the First Amendment Coalition to "endure unnecessarily protracted litigation." 878 F.3d at 1130. The district court had granted summary judgement to the government after the official release of the DOJ White Paper. *Id.* at 1123-24. In doing so the district court "failed to recognize" that the government had thereby waived any previously asserted secrecy and privilege. *Id.* at 1130. In contrast, the Second Circuit had ruled, subsequent